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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONSBANK OF TEXAS, N.A.,
Petitioner,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal statute authorizes the Federal Deposit Insurance Corporation to establish bridge banks to acquire the assets of insured banks that are closed and taken over by the FDIC. The question presented is whether the standard assignment by the FDIC to such a bridge bank of "all right, title and interest of the Receiver" in the assets of a failed bank assigns statutory rights held by the FDIC as receiver.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner NationsBank of Texas, N.A., was plaintiff-appellant below. Pursuant to S. Ct. Rule 29.1, petitioner notes that it is a wholly-owned subsidiary of NationsBank Texas Bancorporation, Inc., which is a wholly-owned subsidiary of NB Holdings Corporation, which in turn is a wholly-owned subsidiary of NationsBank Corporation. Petitioner has no non-wholly owned subsidiaries.

Respondents in the Court of Appeal and before this Court are Commercial National Bank in Shreveport, First Tennessee Bank National Association, First Interstate Bank of Denver, N.A., Norwest Bank, Minnesota, N.A., Texas Commerce Bank, El Paso, N.A., Group Annuity Participant Protection Association, State Street Bank & Trust Company, Underwriters Laboratories, Inc., Chelsea Industries, Inc., British Gas Exploration Production, Inc., CoCARE, and The Official Allocated Annuities Committee.

By duly authorized orders of the Superior Court in California in which this case originated, Executive Life Insurance Company was placed under the statutory conservatorship of California Insurance Commissioner John Garamendi on April 11, 1991, and was liquidated on November 6, 1991. Mr. Garamendi appeared in the Court of Appeal and accordingly he or his successor as Insurance Commissioner is a respondent before this Court.

Sunburst Bank was a plaintiff-appellant below and is a respondent before this Court pursuant to S. Ct. Rule 12.4.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner NationsBank of Texas, N.A. ("NationsBank") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division One entered in the above-captioned proceeding on May 4, 1994.

OPINIONS BELOW

The published opinion of the California Court of Appeal is reported at 24 Cal. App. 4th 1156, 29 Cal. Rptr. 2d 734, and is reprinted in the appendix hereto ("App.") at 2a. The Decision and Judgment of the Los Angeles County Superior Court are not reported, and are reprinted at App. 17a and 19a, respectively.

JURISDICTION

Petitioner NationsBank initiated this action by filing an action for declaratory relief before the Superior Court for Los Angeles County. That court issued a decision on

April 29, 1992 and entered judgment on June 11, 1992, denying NationsBank's motion for summary judgment and granting the cross-motion of respondent John Garamendi, Insurance Commissioner of the State of California. App. 17a, 19a. NationsBank perfected an appeal to the Court of Appeal, which issued an opinion affirming the judgment on different grounds on May 4, 1994. *Id.* at 2a. A timely petition for rehearing was denied by the Court of Appeal on May 27, 1994, *id.* at 16a, and the Supreme Court of California denied a timely petition for review on August 18, 1994. *Id.* at 1a.

The jurisdiction of this Court to review the decision below rests on 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Pertinent provisions of the Competitive Equality Banking Act of 1987, 101 Stat. 552, 629, now codified, as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), as 12 U.S.C. §§ 1821(n)(1)(B)(iii), (3)(A) (Supp. III 1991), and pertinent provisions of 31 U.S.C. § 3713 (1988), are set forth at App. 28a.

STATEMENT OF THE CASE

Introduction. On numerous occasions in the past decade, the Federal Deposit Insurance Corporation (FDIC) has taken over a failed or failing bank, created a so-called "bridge bank" to assume certain assets of the failed bank, and then—through a standard purchase and assumption agreement—assigned its rights and interests as receiver of the failed bank to the bridge bank. Such transactions have facilitated the continued functioning of the national banking system by allowing generally uninterrupted service to the failed bank's depositors and customers. Federal and state courts have concluded—consistent with the policies underlying the federal banking laws—that the assignments by the FDIC transferred to the bridge banks the *FDIC*'s rights as receiver for the failed institution, and not merely the rights and interests of the failed institution itself.

The court below, however, departed from this uniform precedent. It ruled—with respect to one of the largest and most significant purchase and assumption transactions to date—that the FDIC transferred no rights of its own to the bridge bank, but instead transferred only the rights and interests of the failed bank. This decision creates a conflict in the lower courts on a question of considerable importance to the ongoing discharge of the FDIC's statutory responsibilities, and casts a cloud over hundreds of purchase and assumption agreements previously entered into by the FDIC throughout the Nation. This Court should grant certiorari to resolve that conflict.

The question whether the FDIC transfers its rights as receiver or only the rights of the failed institution to the bridge banks it creates arises regularly in a variety of contexts. These include, for example, whether the bridge bank can assert the FDIC's longer statute of limitations in enforcing rights it acquires under the purchase and assumption agreement, whether the bridge bank can rely on the FDIC's rights under the *D'Oench, Duhme* doctrine to defeat unrecorded agreements asserted as defenses by the failed bank's debtors, and whether the bridge bank can rely on the FDIC's rights under the statutory codification of the *D'Oench, Duhme* doctrine for the same purpose. The specific context in which the issue arose in this case concerns whether the bridge bank can assert the FDIC's rights with respect to an asset acquired pursuant to the purchase and assumption agreement under a federal statute giving the government priority in pressing claims against the estates of certain insolvent entities.

The Executive Life Contract. In 1986, the Southeast Texas Housing Finance Corporation ("SETHFCO") issued $300 million in taxable municipal bonds. The Trust Indenture for the bond issue directed the Trustee—InterFirst Bank Houston N.A. ("InterFirst")—to deposit the net proceeds of the bond sale with Executive Life Insurance Company ("Executive Life") under the terms of a guaranteed investment contract (known in the trade as a "GIC"). The GIC required Executive Life to make regu-

lar payments to InterFirst, to be used to fund the debt service on the bonds and pay related administrative expenses. InterFirst could also withdraw funds from the GIC as necessary to provide financing for low-income housing. On maturity of the GIC, Executive Life was obligated to repay InterFirst the original deposit, less any withdrawals. InterFirst would then redeem the bonds from the proceeds of the GIC and any loans made with withdrawals. App. 4a & n.1.

Assignment from Receiver to Bridge Bank. When InterFirst merged into First RepublicBank of Houston, N.A. ("First Republic"), in June 1987, First Republic became the successor Indenture Trustee for the SETHFCO bond issue and holder of the Executive Life GIC. In 1988, the solvency of First Republic came under scrutiny. During the week of July 25, 1988, the FDIC created a bridge bank named JRB Bank, N.A., pursuant to 12 U.S.C. § 1821(i) (1988). Then, on July 29, 1988, the Office of the Comptroller of the Currency declared First Republic insolvent pursuant to 12 U.S.C. § 191 (1988), and named the FDIC receiver of the failed bank as required by 12 U.S.C. § 1821(c) (1988). That same day, under a court-approved purchase and assumption agreement, *see* App. 22a, the FDIC as receiver transferred all "right, title and interest of the Receiver" in First Republic's trust funds and trust business (among other assets) to JRB Bank, N.A. The bridge bank thus became the successor Indenture Trustee for the SETHFCO bond issue and holder of the GIC, and generally continued the operations of the closed bank. Later that day, the FDIC accepted the bid of NCNB Corporation, a bank holding company, to acquire the bridge bank's stock through an intermediate Texas holding company. As a result, the bridge bank was renamed NCNB Texas National Bank. The bank later changed its name to NationsBank of Texas, N.A. App. 5a-6a.

The Executive Life Insolvency. On April 11, 1991, California Insurance Commissioner John Garamendi asked the Los Angeles County Superior Court to place Execu-

tive Life into conservatorship. *See* Cal. Ins. Code § 1011 (West 1993). Executive Life did not oppose the request, and it was duly granted. At the same time the conservatorship court ordered a moratorium on all actions against, and attempts to collect from, Executive Life. Acting as conservator under California law, Commissioner Garamendi almost immediately annouced his position that the holders of GICs like NationsBank and other municipal bond trustees would be treated as general creditors in class 6 to be paid last—and, in fact, nothing at all—in the Executive Life conservatorship. *See id.* § 1033(a)(6) (West 1993).

By the terms of the SETHFCO Trust Indenture, the SETHFCO bonds went into default as a result of the conservatorship. Upon default, the SETHFCO Indenture required NationsBank as successor Trustee to take action to preserve and maximize the bond trust estate.

California Court Proceedings. NationsBank therefore filed a separate action seeking declaratory relief before the same trial judge handling the conservatorship proceeding.[1] As it had done successfully on numerous prior

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[1] NationsBank and the other similarly-situated trustees had already contended in the declaratory relief action that the municipal bond GICs should be entitled at least to a class 5 priority like other insurance products, including annuities and so-called "pension-GICs." *See* Cal. Ins. Code § 1033(a)(5) (West 1993). In November 1991, the trial court agreed and declared that the NationsBank GIC and other GICs supporting bond issues would be accorded class 5 priority as annuities certain. In November 1992, a California Court of Appeal upheld the trial court's judgment that the municipal bond GICs are "insurance annuities-certain" and that their trustee-holders qualify as "policyholders" entitled to class 5 status under any Executive Life rehabilitation plan. *Texas Commerce Bank* v. *Garamendi*, 11 Cal. App. 4th 460, 14 Cal. Rptr. 2d 854 (1992). In March 1993, that same division of the Court of Appeal set aside parts of a proposed plan of rehabilitation that in effect discriminated against NationsBank and other trustee GIC holders as class 5 claimants. *Commercial Nat'l Bank* v. *Superior Court*, 14 Cal. App. 4th 393, 17 Cal. Rptr. 2d 884 (1993). The appeals in this case were assigned to and decided by a different division of the Court of Appeal.

occasions in federal and state court, NationsBank asserted in this case that as a bridge bank assignee of an FDIC Receiver, it could assert the rights of the FDIC with respect to its claim under the GIC. In particular, NationsBank claimed that it was entitled to class 4 priority under California Insurance Code § 1033(a)(4)—which gives class 4 payment status to any claim "having preference by the laws of the United States"—because as an FDIC assignee it was entitled to the federal government priority mandated by 31 U.S.C. § 3713.[2]

NationsBank promptly moved for summary judgment on this claim, explaining (1) that the FDIC is a government agency entitled to the priority granted the United States Government in Section 3713, and (2) that under federal law and the written agreement with the FDIC, NationsBank is entitled as assignee to stand in the FDIC's shoes and assert the same rights with respect to the GIC that the FDIC could have asserted in its own right. The Commissioner filed a cross-motion for summary judgment, and he and other parties opposed NationsBank's motion.

In April 1992, the trial court denied NationsBank's motion and granted summary judgment to the Commissioner, finding that NationsBank's claim under 31 U.S.C. § 3713 was "not a claim of the United States and was not transmogrified into such by the FDIC's intervention." App. 17a. The court did not address the legal effect of the FDIC's assignment of the GIC. After the trial court entered judgment, *id.* at 19a, NationsBank timely appealed to the California Court of Appeal.

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[2] That statute provides that a "claim of the United States Government shall be paid first when * * * a person indebted to the Government is insolvent and * * * an act of bankruptcy is committed * * *." 31 U.S.C. § 3713(a)(1). The court below expressly assumed for discussion that the FDIC is entitled to priority under Section 3713(a)(1) and that its priority is assignable. App. 12a & n.8. That question is not presented by this petition. It should be resolved on remand should this Court grant the petition and reverse the decision below.

The Executive Life Rehabilitation Plan. In the meantime the Commissioner settled the class 4 priority claims of (1) the Internal Revenue Service for income taxes and (2) the Resolution Trust Corporation for repayment of, *inter alia,* losses suffered by failed thrift institutions in RTC receivership. Having previously placed Executive Life into liquidation, the trial court ultimately approved a plan of "rehabilitation" for Executive Life in August 1993, which closed in September 1993. This plan reaffirmed the declaratory judgment denying NationsBank class 4 priority. NationsBank filed timely notices of appeal from the orders approving the plan insofar as they incorporated the earlier judgment in the declaratory relief action. *See id.* at 8a n.5.

Court of Appeal Ruling. On May 4, 1994, the California Court of Appeal—ruling on all of NationsBank's class 4 appeals—upheld the Superior Court's denial of NationsBank's federal priority claim, but for different reasons. The Court of Appeal assumed *arguendo* that the FDIC (1) is an agency of the United States Government entitled to assert the federal priority and (2) has the power to assign that priority to bridge banks like NationsBank. The court held, however, that the purchase and assumption agreement between the FDIC as Receiver for First Republic and the bridge bank—specifying that "the Receiver hereby * * * assigns * * * to [the bridge bank] all right, title and interest of the Receiver" in First Republic's trust business (*id.* at 24a)—did not constitute "an assignment of *anything* belonging to the FDIC" and "did not confer upon NationsBank * * * any claim of priority the FDIC might have had." *Id.* at 13a (emphasis in original). The court read a separate section of the agreement—providing that the bridge bank would "succeed to" the fiduciary obligations of the failed bank "all to the same extent as though [the bridge bank] had originally assumed the same"—as confirmation that NationsBank's rights were limited to those that First Republic possessed, excluding any right to assert the federal priority. *Id.*

The Court of Appeal denied rehearing on May 27, 1994. *Id.* at 16a. The California Supreme Court denied NationsBank's petition for review of the Court of Appeal decision on August 18, 1994. *Id.* at 1a.

How the Federal Question Was Raised. In every pleading filed in state court, NationsBank argued that both as a matter of the federal law governing its agreement with the FDIC and independently as a matter of federal law, it was entitled as a bridge bank and FDIC assignee to assert all the rights of the FDIC in connection with the Executive Life GIC.[3] As noted above, the California trial court did not address the effect or extent of this assignment, instead ruling that NationsBank's claim was not a claim of the United States under 31 U.S.C. § 3713, despite the FDIC's involvement. App. 17a.

By contrast, the California Court of Appeal assumed *arguendo* that the FDIC would be entitled to priority under Section 3713, but held that the FDIC did not transfer that priority to NationsBank as a bridge bank pursuant to the purchase and assumption agreement assignment or federal law. App. 13a-14a. The assignment issue is governed by federal law both as a question of construction of the purchase and assumption agreement, *see* note 7, *infra*, and independently as a question of federal statutory and common law.

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[3] *See, e.g.*, Memorandum of Law in Support of Motion of NationsBank of Texas, N.A., for Summary Judgment, at 1, 4, 13-14; Consolidated Memorandum of Plaintiff NationsBank of Texas, N.A., in Opposition to the Motion for Summary Judgment of the Commissioner and in Reply to the Oppositions to Its Own Motion for Summary Judgment, at 1, 14-17; Appellants' Opening Brief (Court of Appeal), at 30-42; Appellants' Closing Brief (Court of Appeal), at 27-48; Petition for Rehearing (Court of Appeal), at 4-5 & n.1; Petition for Review (Cal. S. Ct.), at 3-4 & n.2.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS HOLDING THAT THE ASSIGNMENT BY THE FDIC OF THE ASSETS OF A FAILED BANK TRANSFERS THE FDIC'S RIGHTS TO THE ASSIGNEE

The question whether a bridge bank assignee of the FDIC succeeds to the FDIC's rights or instead merely the rights of the failed bank taken over by the FDIC has arisen repeatedly in both state and federal courts in a variety of contexts. Those courts have held that the typical purchase and assumption agreement entered into by the FDIC and a bridge bank transfers to the bridge bank the rights of the FDIC as receiver, not simply the more limited interests of the failed bank. The contrary decision below conflicts with this established body of precedent. Because the question presented will continue to arise in the lower courts as a result of the many bridge bank transactions entered into by the FDIC, this Court should grant the writ and resolve the conflict.

One situation in which the question presented arises with some frequency is when an FDIC assignee bridge bank attempts to assert the *D'Oench, Duhme* doctrine with respect to an asset acquired from the FDIC as receiver. That doctrine, arising from this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), protects the FDIC from misrepresentations regarding the assets of banks it insures by providing that unrecorded agreements with a bank limiting the enforceability of a note cannot be asserted against the FDIC when it takes over the bank as receiver.[4] The right to rely on the *D'Oench, Duhme* doctrine is plainly a right of the FDIC as receiver and not in any sense a right of the failed institution taken over by the FDIC. Under

[4] The doctrine has been expanded beyond the facts in *D'Oench, Duhme* itself. *See, e.g., Langley* v. *FDIC*, 484 U.S. 86 (1987).

the reasoning of the California Court of Appeal below, that right would not be transferred to a bridge bank assignee of the FDIC, because the FDIC transfers no rights of its own but only those rights it received from the failed bank. *See* App. 13a (purchase and assumption agreement does not assign *"anything* belonging to the FDIC") (emphasis in original). Yet the lower courts uniformly have held that bridge banks—pursuant to purchase and assumption agreements indistinguishable from the one at issue here—succeeded to the FDIC's right to assert the *D'Oench, Duhme* doctrine.

In *Bell & Murphy & Assocs.* v. *Interfirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990), the Fifth Circuit applied *D'Oench, Duhme* to preclude plaintiffs from enforcing an unrecorded side agreement with First RepublicBank Dallas, N.A., which the FDIC took over when it became insolvent and transferred in part to NCNB Texas National Bank (*i.e.*, NationsBank) pursuant to a purchase and assumption agreement indistinguishable from the one involved in this case. The court specifically rejected the contention that "*D'Oench, Duhme*'s protections, even if applicable, do not bar a recovery against NCNB, the bridge bank authorized by the FDIC to acquire the assets and liabilities of the failed Republic." *Id.* at 754. The Court of Appeals reasoned that "failure to extend *D'Oench, Duhme*'s protection to bridge banks would undermine the effectiveness of bridge banks as a means of continuing the normal banking operations, and therefore protecting the depositors and creditors, of a failed bank." *Id.* The court accordingly held that "claims barred as to the FDIC by the *D'Oench, Duhme* doctrine likewise are barred as to bridge banks authorized by the FDIC to take over the operations of a failed bank." *Id.* at 754-755. The Fifth Circuit applied this holding in another case arising out of the very same purchase and assumption agreement at issue here, *Kilpatrick* v. *Riddle*, 907 F.2d 1523 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991), ruling that plaintiffs were barred by *D'Oench,*

Duhme from asserting certain securities claims against both the FDIC as receiver for First RepublicBank and NCNB Texas National Bank (*i.e.*, NationsBank) as bridge bank assignee of the FDIC.

The Fifth Circuit has adhered to this understanding of the rights of FDIC assignees in cases involving similar purchase and assumption agreements. *Porras* v. *Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir. 1990), for example, involved a private party FDIC assignee, not a bridge bank. Relying on *Bell & Murphy*, the court ruled that the holding that an assignee succeeds to the FDIC's *D'Oench, Duhme* rights applied with equal force. The court explained that it was the "primary duty" of the FDIC to protect depositors of failed institutions, and that "[t]he preferred method of ensuring that depositors are paid is through the use of purchase and assumption agreements." *Id.* at 380. As the court reasoned:

> Purchase and assumption agreements are preferred because they minimize the corporation's losses, expand the purchasing institutions' opportunities at low risk, and protect depositors. * * * *D'Oench, Duhme* promotes purchase and assumption transactions by offering the purchaser protection from secret agreements that tend to affect adversely its rights in the instruments that it acquires. * * * Extending *D'Oench, Duhme* to transferees of assets from the FSLIC, therefore, provides the FSLIC with greater opportunity to protect the failed institutions' assets. [*Id.* at 381.]

See also FSLIC v. *Cribbs*, 918 F.2d 557, 560 (5th Cir. 1990) (contention that assignee of FSLIC is not entitled to same protection of *D'Oench, Duhme* enjoyed by FSLIC rejected as "wholly meritless"). The Eleventh Circuit, relying on the Fifth Circuit's opinion in *Porras*, has applied the same rule. *Victor Hotel Corp.* v. *FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991) ("No dispute exists as to whether *D'Oench*'s protection extends to successors in interest to the FSLIC.") (citing *Porras*, 903 F.2d at 381).

The Eighth Circuit reached the same result as the Fifth and Eleventh Circuits in *FDIC* v. *Newhart*, 892 F.2d 47, 50 (8th Cir. 1989), in the context of applying 12 U.S.C. § 1823(e) (1988), the statutory codification of *D'Oench, Duhme*. The case concerned an alleged oral agreement by a bank that it would not look to a surety for repayment of certain promissory notes. After the bank became insolvent, the FDIC in its corporate capacity purchased the notes and later sold them to a private third party pursuant to a purchase and assumption agreement. The court held that the private third party succeeded to the FDIC's rights under 12 U.S.C. § 1823(e), explaining that "the FDIC transfers its protected status to subsequent purchasers of notes it holds." 892 F.2d at 50. The court based its holding on "the law of commercial paper" and policy arguments identified by the district court:

> [A] contrary result would emasculate the policy behind § 1823(e) of promoting purchase and assumption transactions. If holder in due course status did not run with the notes acquired by the FDIC in purchase and assumption transactions, the market for such notes would be smaller, which would have a deleterious effect on the FDIC's ability to protect the assets of failed banks. [892 F.2d at 50.]

The question presented by this petition also arises frequently in connection with the statute of limitations applicable to claims that bridge banks acquire by assignment from the FDIC pursuant to purchase and assumption agreements. In the hands of the insolvent institution, such claims are governed by the applicable state statute of limitations, and state law governs related questions such as when the statutory period begins to run. The FDIC as receiver, however, enjoys the benefit of federal statutory provisions specifying typically longer limitations periods and providing that the period does not begin to run until appointment of the FDIC as receiver or the date the claim accrues, whichever is later. *See* 12 U.S.C. § 1821(d)(14) (Supp. III 1991); 28 U.S.C. § 2415(a) (1988).

Under the reasoning of the California Court of Appeal below, the FDIC as receiver transfers to an assignee bridge bank no right of its own, but only the rights and interests of the failed institution. Accordingly, under the ruling below, the claims of an FDIC assignee bridge bank would be governed by the same state statute of limitations that governed the claims in the hands of the failed institution. Yet the lower courts uniformly have held that bridge banks—pursuant to purchase and assumption agreements indistinguishable from the one at issue here—succeeded to the longer statute of limitations period and more favorable accrual date enjoyed by the FDIC as receiver.

For example, in *FDIC* v. *Bledsoe*, 989 F.2d 805 (5th Cir. 1993), the Fifth Circuit recently noted that the pertinent federal statutory provisions did not address the question whether an assignee inherits the federal receiver's limitations period. The court accordingly looked to common law to fill the statutory gap.

> Fortunately, while the statute is quiet, the common law speaks in a loud and consistent voice: *An assignee stands in the shoes of his assignor.* * * * Applying this common law principle to the case at hand, Federal Savings, as the assignee, stood in the shoes of the FSLIC, the assignor, and thus received the FSLIC's six year period of limitations. [*Id.* at 810 (emphasis in original).]

While the California Court of Appeal specifically rejected the argument that the cases holding that assignees succeed to the FDIC's rights under *D'Oench, Duhme* support the contention that they similarly succeed to the FDIC's priority, *see* App. 13a-14a, the Fifth Circuit in *Bledsoe* relied on the *D'Oench, Duhme* cases to support its holding that assignees succeed to the federal receiver's longer period of limitations. Citing *Porras, Bell & Murphy, Cribbs*, and *Newhart*, *see supra* at 10-12, the Fifth Circuit explained that its "conclusion that the federal six year statute of limitations transfers to private assignees

is bolstered by the closely related line of cases by which we have extended the protection of the *D'Oench, Duhme* doctrine to private assignees of the FDIC and the FSLIC." 989 F.2d at 810-811 & n.7. The court recognized that the same policy of facilitating purchase and assumption agreements to allow the FDIC to rid the federal system of failed bank assets that supported extension of the receiver's *D'Oench, Duhme* rights to assignees also supported a similar extension of the receiver's right to a longer limitations period. *Id.* at 811.

Every state court of last resort to have considered the question has reached the same result as the Fifth Circuit in *Bledsoe*, for the same reasons. In *Tivoli Ventures, Inc.* v. *Bumann*, 870 P.2d 1244 (Colo. 1994), the FDIC as receiver gained possession of a note from a failed institution and then entered into an agreement pursuant to which it assigned its "right, title and interest" in the note to Lease Finance—the same operative language that is at issue in this case. *See* App. 24a. Recovery on the note was barred unless this assignment transferred the FDIC's right to the federal limitations period. The Supreme Court of Colorado held that it did, noting that "[a]llowing private-party assignees to step into the shoes of the FDIC for purposes of the statute of limitations facilitates expunging the federal system of failed bank assets and is consistent with the intent and language of the federal statute as well as the requirements of the common law." *Id.* at 1250. Like the Fifth Circuit in *Bledsoe*, the Colorado Supreme Court relied upon the cases extending *D'Oench, Duhme* protections to FDIC assignees in extending the federal statute of limitations to them as well. *Id.* at 1249.

The Supreme Court of Texas recently reached the same result in *Jackson* v. *Thweatt*, 883 S.W.2d 171 (Tex.), *cert. denied*, 115 S. Ct. 196 (1994), holding that "the FDIC's successors in interest are entitled to the benefits of section 1821(d)(14) pursuant to the common law maxim that '[a]n assignee stands in the shoes of his as-

signor.' " *Id.* at 174 (quoting *Bledsoe*, 989 F.2d at 810). The Texas Supreme Court noted that this rule was "particularly compelling with regard to notes acquired by the FDIC from an insolvent bank and sold to third parties pursuant to a purchase and assumption transaction." *Id.* The court explained that a contrary result would diminish the value of the notes in the hands of the FDIC, noting that the "FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC." *Id.* (quotation omitted). Like the Fifth Circuit in *Bledsoe* and the Colorado Supreme Court in *Tivoli Ventures*, the Texas Supreme Court analogized to the cases extending "the FDIC's special rights" under *D'Oench, Duhme* and 12 U.S.C. § 1823(e) to assignees. *See* 883 S.W.2d at 175.

The Supreme Court of Kansas followed the same approach and arrived at the same conclusion in *Cadle Company II, Inc.* v. *Lewis*, 254 Kan. 158, 864 P.2d 718 (1993), *cert. denied*, 114 S. Ct. 1613 (1994), agreeing with the FDIC assignee's argument that "because it was assigned the note by the FDIC, it succeeded to all the rights and remedies available to the FDIC, including the six-year limitations period." 864 P.2d at 720, 724. The court quoted from *Mountain States Financial Resources* v. *Agrawal*, 777 F. Supp. 1550, 1552 (W.D. Okla. 1991), for the proposition that "[a]n assignee stands in the shoes of the assignor, and acquires *all* of the assignor's rights and liabilities in the assignment. This general principle and a strong public policy require that the FDIC's assignee acquire the six-year limitations period provided by § 1821(d)(14)(A)." 864 P.2d at 721 (emphasis added). The Kansas Supreme Court also relied on the analogy to the *D'Oench, Duhme* cases. *Id.* at 721-723.

Central States Resources, Corp. v. *First National Bank in Morrill*, 243 Neb. 538, 501 N.W.2d 271 (1993), involved a participation interest in a loan acquired by the FDIC as receiver from an insolvent institution and assigned to Central States. The Supreme Court of Nebraska

ruled that "[u]nder a participation agreement, a 'downstream' bank is akin to an assignee of a promissory note who stands in the shoes of the assignor and obtains the right, title and interest that the assignor had at the time of assignment." *Id.* at 276. Included in that "right, title and interest" transferred to the assignee, the court ruled, is the FDIC's right to assert the federal statute of limitations. *Id.* at 278.[5]

The decision of the California Court of Appeal conflicts with this uniform body of precedent, both in result and reasoning. The court below held that the FDIC's assignment of "all right, title and interest of the Receiver in and to" enumerated assets of the failed bank was not "an assignment of *anything* belonging to the FDIC." App. 13a (emphasis in original). The federal circuit and state supreme court precedent outlined above holds that under indistinguishable assignment language the FDIC does indeed assign things that belong to it as receiver but do not belong to the failed institution. The right to rely on *D'Oench, Duhme,* on 12 U.S.C. § 1823(e), or on the federal statute of limitations in 12 U.S.C. § 1821(d)(14) or 28 U.S.C. § 2415(a) are rights belonging to the FDIC that plainly do not belong to the failed institution, yet the uniform rule is that those rights are transferred to FDIC assignees along with the assets to which the rights relate.

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[5] Federal district court and lower state court decisions are now uniformly to the same effect. *See, e.g., Mountain States Financial Resources Corp.* v. *Agrawal,* 777 F. Supp. at 1552; *North American Credit Consultants* v. *Garlick Sales & Services Co.,* No. Civ. 91-1066-C, 1992 WL 477016, at *3 (W.D. Okla., Oct. 20, 1992); *Fall* v. *Keasler,* No. C 90 20643 SW, 1991 WL 340182 at *3 (N.D. Cal., Dec. 18, 1991) (when FDIC assignee "took the assignment of the note he also took the benefit of the statute of limitations afforded the FDIC;" analogy to *D'Oench, Duhme* cases); *White* v. *Moriarity,* 15 Cal. App. 4th 1290, 1297-98, 19 Cal. Rptr. 2d 200, 204 (1993); *Cadle Company II, Inc.* v. *Stamm,* 633 So. 2d 45, 46 (Fla. Dist. Ct. App. 1994); *Martin* v. *Pioneer Title Co.,* No. 96438, 1993 WL 381101 at *2-3 (Idaho Ct. App., July 8, 1993).

The decision below also rejects the reasoning of the other cases. The California Court of Appeal expressly declined in its opinion to follow cases such as *Bell & Murphy* and *Cadle Company II, Inc.* v. *Lewis,* which extended the *D'Oench, Duhme* doctrine to FDIC assignees, arguing that the doctrine has never been applied "to create an implied assignment bestowing upon an assignee of the FDIC a governmental priority over other claimants." App. 14a. But all of the cases discussed above did in fact "create an implied assignment." In none of the cases did the language of the purchase and assumption agreement specifically assign the FDIC's right to rely on the federal statute of limitations or *D'Oench, Duhme,* and in none of the cases did the language of the federal statutes conferring these rights on the FDIC provide that the rights were conveyed to assignees. Applying common law rules and federal banking policy, and filling in the gaps in the pertinent federal statutes, the courts nonetheless concluded—without exception—that FDIC assignees acquired such rights when they succeeded to the *FDIC*'s rights in the assets of the failed institution.

Nor is the right to assert the FDIC's priority at issue in this case in any sense a more extensive right than the rights at issue in the other cases. The right to assert the FDIC's statute of limitations allows assignees to assert claims against third parties that would otherwise be barred altogether under state law. The right to assert the *D'Oench, Duhme* doctrine or the FDIC's rights under 12 U.S.C. § 1823(e) allows assignees to defeat agreements otherwise fully enforceable under state law. The right to assert the FDIC's priority in a liquidation is markedly less intrusive than these other rights that courts uniformly have found are assigned by the FDIC along with and incident to the assignment of the assets of the failed institution.

II. THE DECISION BELOW THAT THE ASSIGNMENT BY THE FDIC DID NOT TRANSFER ANY RIGHTS OF THE FDIC IS WRONG

Given that the decision below conflicts with a uniform body of precedent holding that the FDIC transfers *its* rights as receiver to assignee banks—and not merely the lesser rights it inherited from the failed institutions—it should come as no surprise that the decision below is also wrong. The reasoning in the foregoing cases from the Fifth, Eighth, and Eleventh Circuits, and the Supreme Courts of Colorado, Texas, Kansas, and Nebraska, make that clear.

As those courts have explained, the statutory provisions conferring certain rights on the FDIC as receiver, and authorizing the FDIC to assign the assets of failed institutions it has taken over to bridge banks or other third parties, do not specifically address the question of whether the rights of the FDIC as receiver are conveyed to the assignee along with the assets of the failed institution. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") simply authorizes the FDIC to establish bridge banks to purchase such assets of the closed bank as the FDIC may, in its discretion, determine to be appropriate. 12 U.S.C. § 1821(n)(1)(B)(iii). Like the FDIC statute of limitations provision (12 U.S.C. § 1821(d)(14)(A)) and the *D'Oench, Duhme* provision (12 U.S.C. § 1823(e)), the provision which the court below assumed conferred priority on the FDIC, 31 U.S.C. § 3713(a)(1), *see* App. 12a, is also silent with respect to whether that priority is transferred to FDIC assignees.

As the Fifth Circuit explained in *Bledsoe*, when "the statute at hand is silent as to the rights of assignees, we turn to the common law to fill the gap" in the statutory scheme. 989 F.2d at 810. Here the common law provides a clear rule: an assignee stands in the shoes of its assignor, inheriting all right, title and interest of the assignor. *Id.*

As this Court explained long ago, with respect to a government contract, "[a] voluntary assignee is ordinarily invested with all the rights his assignor possessed." *Hofeld* v. *United States,* 186 U.S. 273, 276 (1902). This is not a novel proposition of law. Contract and commercial law both operate under the same premise. One prominent commentator refers to the "rule that the assignee is entitled to the benefit of any rights or remedies available to the assignor." *Williston on Contracts* § 432A at 202 (3d ed. 1960); *accord,* 4 *Corbin on Contracts* § 905 (1963); Restatement, Second, Contracts § 336(1) and cmt. b (1981). The Uniform Commercial Code applies the same rule: the assignee is vested with "such rights as the [assignor] has" in the negotiable contract. U.C.C. § 3-201; *accord,* § 8-301 (negotiable securities).

Among the rights of the assignor acquired by an assignee is the assignor's right to priority in insolvency proceedings. *Williston on Contracts* § 432A at 202; Restatement, Second, Contracts § 340(1) and cmt. a (1981).[6] This Court applied that rule in *Bramwell* v. *United States Fidelity & Guar. Co.,* 269 U.S. 483 (1926), holding that an assignment by an agent of the United States government conveys the government's right to priority under 31 U.S.C. § 3713. In *Bramwell,* USF&G had paid an insured deposit of Indian funds held in trust in a failed bank by an agent of the Secretary of the Interior and

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[6] Restatement, Second, Contracts § 340(1) at 86 (1981) states: "An assignee is entitled to priority of payment from the obligor's insolvent estate to the extent that the assignor would have been so entitled in the absence of assignment." Comment a to that section states: "*Priority.* The principle that an assignment transfers to the assignee the same right held by the assignor, with its advantages and disadvantages, applies to priority of payment in insolvency proceedings." *See, e.g., In re SPM Mfg. Corp.,* 984 F.2d 1305, 1318 (1st Cir. 1993) ("a valid assignment of a debt does not divest the claim of its priority * * *; the assignee steps into the shoes of the assignor for the portion of the debt assigned") (Massachusetts law); *In re Allen Carpet Shops, Inc.,* 27 B.R. 354, 357 (E.D.N.Y. 1983) ("It is well established in case law that assignees of wage claims are entitled to the wage priority position of their assignors.") (citations omitted).

been assigned the government's claim against the failed bank. Applying the direct predecessor to Section 3713, this Court stated that USF&G, having "received from the United States an assignment of its claim against the bank, * * * has the priority, if any, that belonged to the United States." *Id.* at 486. While it is true that USF&G—as surety for the government—was entitled to the priority as a matter of statute, this Court plainly premised its decision on the broader proposition that USF&G was entitled to assert the government priority as assignee of the government.

The policies underlying the federal banking statutes compel the same result indicated by the settled common law rule, and other courts have consistently looked to those policies in ruling that the FDIC assigns to bridge banks its rights—not simply those of the failed institution —when it enters into purchase and assumption agreements. Two sets of policies intersect in deciding the question presented. First, Congress has conferred on the FDIC certain rights that it enjoys as receiver of a failed institution that are beyond those of the failed institution itself—the *D'Oench, Duhme* rights, the longer limitations period, and—we submit—the right to priority in cases of insolvency. Second, in authorizing the FDIC to create bridge banks and transfer to those banks certain assets of closed banks, Congress established a means for the FDIC promptly "to rid the federal system of failed bank assets" and ensure generally uninterrupted service for failed bank depositors and customers. *Bledsoe,* 989 F.2d at 811 (*quoting Fall* v. *Keasler,* No. C 90 20643 SW, 1991 WL 340182 (N.D. Cal. Dec. 18, 1991)).

It is plain that only a recognition that the FDIC assigns its special rights with respect to failed bank assets when it assigns those assets will serve both of these critical policies. If the FDIC did not assign its special rights along with the underlying assets to which they relate, the failed bank assets would be worth markedly less to any prospective assignee than they are in the hands of the FDIC. *Jackson* v. *Thweatt,* 883 S.W.2d at 174; *Tivoli*

Ventures, 870 P.2d at 1250; *Cadle Company II,* 846 P.2d at 722-723. To secure the full value Congress intended it to enjoy as a result of its special rights as receiver, the FDIC would be obligated to retain the assets itself. Such a result, however, would run directly counter to the congressional policy encouraging the FDIC—through the creation of bridge banks—to act promptly to rid the federal system of the assets of failed banks. *See Bell & Murphy,* 894 F.2d at 754; *FDIC* v. *Newhart,* 892 F.2d at 50; *Porras,* 903 F.2d at 381. Recognition that the FDIC transfers *its* rights in the assets of the failed bank, rather than simply the rights of the failed bank when it assigns those assets, serves both the policy underlying Congress' decision to confer special rights on the FDIC as receiver, and the policy underlying Congress' decision to authorize the FDIC to establish and use bridge banks to rid the federal system of failed bank assets.

The FDIC has relied on the effectiveness of its unrestricted assignment language in resolving the recent rash of bank insolvencies. The whole point of that language is to relieve the FDIC of the burden of collecting the note assets and managing the trust assets of large banking organizations that fail. If, however, the FDIC runs the risk that its assignment language will be held ineffective to empower the assuming banks to take action with confidence that they will be treated just like the FDIC, the FDIC will be faced with the difficult dilemma of choosing whether to handle the assets itself as receiver or to obtain less from assuming banks for those assets.

This Court relied upon similar policy considerations in upholding a priority claim under 31 U.S.C. § 3713 that benefitted a private lender in *SBA* v. *McClellan,* 364 U.S. 446 (1960). A private lender had joined with the Small Business Administration in making a loan, and when the debtor became insolvent the SBA agreed to turn over to the private lender a portion of any distribution it received from the estate. This Court held that such an agreement did not defeat the government's priority claim under Sec-

tion 3713, noting that the SBA's mission included encouraging private banks to loan to small businesses, and that the agreement at issue was well adapted to that end. Accepting the argument that the agreement with the private lender should defeat the priority "would make it more difficult for the Administration to perform its statutory duties." *Id.* at 452. So too here accepting the argument that the FDIC does not assign its priority when it assigns "all right, title and interest" in the underlying asset (App. 24a) would seriously hamper the FDIC in performing its statutory duties. The Court in *McClellan* rejected the argument that the agreement at issue unfairly elevated the private lender over other creditors: "[T]his position is a result, not of any inequality of distribution on the part of the bankruptcy court, but of the bank's valid contract with the [SBA]." 364 U.S. at 452-453. Again, the same is true here, and the contrary ruling of the court below interferes with the FDIC's ability to discharge its statutory responsibilities.

The court below viewed the language of the purchase and assumption agreement as an impediment to the conclusion that the FDIC transferred its rights as receiver to NationsBank, but other courts have reached the opposite result on the basis of indistinguishable operative language. The construction of the standard purchase and assumption agreement assigning all right, title, and interest of the FDIC as receiver in a failed bank's assets to a bridge bank is governed by federal law.[7] Nothing in the

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[7] *See, e.g., United States* v. *Seckinger*, 397 U.S. 203, 209-210 (1970) ("federal law controls the interpretation of the contract. * * * This conclusion results from the fact that the contract was entered into pursuant to authority conferred by federal statute and, ultimately, the Constitution") (footnote omitted); *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944) ("The * * * construction of contracts [executed by the United States] * * * present[s] questions of federal law not controlled by the law of any State"); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943); *United States* v. *Tharp*, 973 F.2d 619, 621 (8th Cir. 1992); *Grosinsky* v. *United States*, 947 F.2d 417, 419 (9th Cir. 1991); *United States* v. *Triple A Machine Shop, Inc.*,

language of that agreement is inconsistent with the conclusion compelled by federal policy and common law.

Section 3.1 of the agreement assigned to the bridge bank "all right, title and interest *of the Receiver* [the FDIC] in and to" certain listed assets. *Id.* at 24a (emphasis added). Included in the assets assigned were the failed bank's "trust business," which included the GIC. *Id.* at 25a; *see NCNB Texas Nat'l Bank* v. *Cowden,* 895 F.2d 1488, 1497 (5th Cir. 1990). It is difficult to conceive of a more forceful way to provide that the bridge bank was assigned *everything* the FDIC as receiver possessed in connection with the trust business than to assign "all right, title and interest of the Receiver," without limitation. Another portion of the agreement, Section 3.1(o), expressly *restricted* rights as to *other* assets, App. 25a, demonstrating the unlimited nature of the FDIC's assignment with respect to the trust business assets. As noted, other courts construing similar "right, title and interest" language have never suggested that the agreement's encompassing language limited the assignee's rights.

To support its contrary conclusion, the court below turned to a provision of the agreement that appears several pages after Section 3.1, in a different article, pertaining to "Assumption of Certain Duties and Obligations." That provision, Section 4.7(a), states:

> The Assuming Bank shall * * * succeed to the rights, obligations, properties, assets, investments, deposits, agreements and trusts of the Failed Bank under (i) trusts, executorships, administrations, guardianships, agencies and (ii) other fiduciary or

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857 F.2d 579, 585 (9th Cir. 1988). *See also Downriver Comm. Fed. Cr. Un.* v. *Penn Sq. Bank,* 879 F.2d 754, 759 (10th Cir. 1989) ("As of the moment that a national bank is declared insolvent and goes into the hands of a receiver, federal law governs the distribution of the bank's assets."), *cert. denied,* 493 U.S. 1070 (1990); *Dababneh* v. *FDIC,* 971 F.2d 428, 433 (10th Cir. 1992). The purchase and assumption agreement itself provides that it is governed by federal law. App. 27a.

> representative capacities, all to the same extent as though the Assuming Bank had originally assumed the same * * *. [App. 26a-27a.]

The Court of Appeal concluded that Section 4.7(a) warranted a limited reading of the earlier unrestricted assignment of Section 3.1, because the later section manifested an intent to transfer only the rights that the failed banks had in the trust assets, as though NationsBank were the original trustee and the FDIC were never involved. App. 13a.

Properly construed, however, none of the terms of Section 4.7(a) or any other provision of Article IV purport to limit anything in Section 3.1 or any other provision of Article III. Far from limiting the bridge bank's rights, Section 4.7(a) affirmatively empowers NationsBank to act as successor fiduciary with respect to the trust business. Because the FDIC was never appointed as fiduciary for any trust matter, it had no such appointments to "assign" to the bridge bank. If the bridge bank were to assume the fiduciary appointments and obligations, it could do so only by "succeeding" to the appointments of the failed bank. This is why Section 4.7(a) is written in terms of "succession" to the rights of the *failed bank* rather than to the rights of the FDIC. And by providing that this succession accomplished such a transfer of rights and duties "to the same extent as though [the bridge bank] had originally assumed the same," the agreement made clear that the succession was unlimited.[8]

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[8] The Fifth Circuit confirmed this understanding of the agreement in *Cowden*. There, beneficiaries of trusts for which an insolvent First RepublicBank had been acting as trustee and which the FDIC had assigned to NationsBank challenged the validity of NationsBank's succession to the fiduciary appointments and its power to make distributions under the trust instruments. The Fifth Circuit agreed with the FDIC that the language of Section 4.7(a)—the precise language the California Court of Appeal misconstrued as *limiting* the FDIC's authority to assign the federal priority—was effective to transfer the fiduciary appointment powers to NationsBank. 895 F.2d at 1497-1501.

Section 4.7(a) was thus designed to facilitate the transfer of fiduciary duties to NationsBank and enable NationsBank to assume those duties without the need to seek state court appointments. It was not in any way intended to *limit* the rights of the bridge bank. In short, the "specific" language of Section 4.7(a) does not apply to, much less override, the "general language" of Section 3.1 conveying to NationsBank "*all* right, title and interest" of the FDIC Receiver—including the right to priority under 31 U.S.C. § 3713.

III. THE QUESTION PRESENTED IS IMPORTANT TO THE NATIONAL BANKING SYSTEM

The power to establish bridge banks was one of the most important tools sought by the FDIC as a means to resolve the surge in bank failures occurring in the mid to late 1980s. In considering the Competitive Equality Banking Act of 1987—which provided the FDIC with the authority to establish bridge banks—Congress acknowledged that the surge of bank failures at the time was likely to continue and that, among other factors, "the relatively large size of some troubled banks" made it "increasingly difficult to find purchasers for all failed banks." S. Rep. No. 19, 100th Cong., 1st Sess. 22 (1987).

The FDIC sought the authority to establish bridge banks in order to "enhance its ability to handle failed and failing banks with minimum disruption to local economies and minimum cost to the insurance fund." 133 Cong. Rec. 6804-05 (1987) (Remarks of Sen. Proxmire). As Robert Clark, then Comptroller of the Currency, explained to the Senate Banking Committee, once the FDIC gained the authority to establish bridge banks, "it is more likely that a purchase could be arranged for the [failed] bank, thus saving the FDIC money while continuing to provide banking services to the community." *Strengthening the Safety and Soundness of the Financial Services Industry: Hearings Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 7 (1987) (statement of Robert Clark). In considering the

amendments to the bridge bank statutory provisions accomplished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Congress recognized that the FDIC uses its power to establish a bridge bank "in order to preserve or attempt to preserve the going concern value of an institution." H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 397 (1989).

The legislation enacted by Congress provides the FDIC with broad powers in establishing bridge banks. The Competitive Equality Banking Act provided the FDIC with the discretion to determine when to establish a bridge bank, 12 U.S.C. § 1821(i)(1) (1988), and which assets and liabilities of the failed bank will become part of the bridge bank. *Id.* § 1821(i)(3)(A). The 1989 amendments to the bridge bank legislation accomplished by FIRREA committed even more discretion to the FDIC by removing the provision which required court approval of the FDIC's decision to establish a bridge bank. *Id.* § 1821(n)(3)(A)(iv) (Supp. III 1991).

The FDIC uses its power to establish bridge banks in order to resolve the problems caused by the largest bank failures. For example, the FDIC handled the three largest bank failures in 1989 by placing over 20 billion dollars of assets of these banks into three bridge banks. 1989 FDIC Annual Report 12-13. Although one of these bridge banks was sold almost immediately, the remaining two bridge banks carried on the business of the failed banks for a number of months until purchasers could be found. *Id.* at 13. Similarly, in 1992, the FDIC handled "one of the largest failed bank transactions in FDIC history" by placing 8.8 billion dollars of assets of 20 subsidiaries of First City Bancorporation of Texas into 20 bridge banks. 1992 FDIC Annual Report 34. These bridge banks operated for several months until they were sold to various purchasers through purchase and assumption agreements. 1993 FDIC Annual Report 23. These examples illustrate the importance of bridge banks in continuing the business of the largest failed banks as a means

of providing virtually uninterrupted service to consumers and protecting the going concern value of the failed banks until a purchaser can be found. In the absence of the FDIC's authority to establish bridge banks, the FDIC would be unable to shop for a suitable purchaser for these largest of failed banks and would be forced either to accept a lower sale value, or to liquidate these large banks at great cost.

As discussed above, however, the value of a bridge bank's assets is significantly lowered if potential buyers do not have confidence that the buyer will succeed to the rights of the FDIC in the acquisition of the assets of the failed bank. The ultimate purpose of the FDIC's statutory authority in establishing bridge banks is to return the assets of the failed bank, as passed through the bridge bank, back into the private sector. H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 174-175 (1987) (a bridge bank "enables the FDIC to bridge the gap between the failed bank and a satisfactory purchase-and-assumption or other transaction that cannot be accomplished at the time of failure"). It is only through purchase and assumption agreements, however, that this ultimate statutory authority can be effectuated. If the FDIC and potential purchasers of failed banks cannot have confidence that the FDIC's assignment through the purchase and assumption agreement is effective in passing the rights of the FDIC to the buyer, the FDIC will be forced to handle the assets itself as receiver, or to accept a lower price for those assets; either of these outcomes frustrates the important federal policy goals behind granting the FDIC the authority to establish bridge banks.

The language of the purchase and assumption agreement in the instant case is not original or unusual; as is evident from the cases cited above, the FDIC uses similar if not identical language in all its purchase and assumption agreements with bridge banks. The FDIC relies on this unrestricted assignment language in order to receive a premium from purchasers who will obviously

pay more for assets which are accompanied by the FDIC's powers as receiver under the federal banking laws.

The decision below, moreover, affects transactions of the FDIC beyond bridge banks and casts a cloud on the effectiveness of the FDIC's assignment of its "right, title and interest" through purchase and assumption agreements with third parties with or without the establishment of a bridge bank. The FDIC entered into more than 500 such purchase and assumption transactions from 1989-1993 alone.[9] As is clear from the reported decisions cited above, the operative language of these purchase and assumption agreements is similar, if not identical, to the language contained in the purchase and assumption agreement between NationsBank and the FDIC in the instant case. If this Court does not address whether the standard purchase and assumption agreement passes the FDIC's statutory rights on to assignees, then the effectiveness of hundreds of purchase and assumption agreements already entered into by the FDIC with bridge banks and with other third parties will be called into question. Furthermore, if the decision below stands—in contradiction to every other court to have considered the question—then the FDIC will be hampered not just in its bridge bank transactions but in all future transactions in which it relies on its purchase and assumption agreement to allow the assets of failed banks to remain in the private sector.

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[9] Since at least 1988, the FDIC has used purchase and assumption agreements to handle the vast majority of the Nation's failed banks. *See* 1993 FDIC Annual Report 21 (FDIC used purchase and assumption transactions to resolve 30 of the 41 failed banks for the year); 1992 FDIC Annual Report 35 (purchase and assumption agreements used in resolution of 83 of the 120 failed banks); 1991 FDIC Annual Report 20 (103 of the 124 bank failures resolved through purchase and assumption agreements); 1990 FDIC Annual Report 24 (148 of 168 failed banks handled through purchase and assumption agreements); 1989 FDIC Annual Report 12 (purchase and assumption agreements used to resolve 84 percent of the total 174 bank failures).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed Aug. 18, 1994]

Second Appellate District, Division One, No. B070030
B070031/B071799/B072863/B079046
S040439

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUNBURST BANK,
Appellant

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Respondents

AND COMPANION CASES

Petition for review DENIED.

/s/ Lucas
Chief Justice

APPENDIX B

[Filed May 4, 1994]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B070030
(Super.Ct.No. BC033211)

SUNBURST BANK,
Plaintiff and Appellant,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Defendants and Respondents.

B070031
(Super.Ct.No. BC037933)

NATIONSBANK OF TEXAS,
Plaintiff and Appellant,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Defendants and Respondents.

B071799, B072863, B079406
(Super.Ct.No. BS006912)

JOHN GARAMENDI, As Insurance Commissioner, etc.,
Plaintiff,

v.

EXECUTIVE LIFE INSURANCE COMPANY,
Defendant.

APPEALS from judgments of the Superior Court of Los Angeles County, Kurt J. Lewin, Judge. Dismissed in part; affirmed in part.

Daniel & Lezar, Robert D. Daniel, and Peveril O. Settle III, for Plaintiff and Appellant NationsBank of Texas, N.A.

Crosby, Heafey, Roach & May, Peter W. Davis, Paul D. Fogel, and Marc R. Benson, for Plaintiffs and Appellants Sunburst Bank and NationsBank of Texas, N.A.

Phelps Dunbar, Michael D. Hunt, and Allen D. Darden, for Plaintiff and Appellant Sunburst Bank.

Cook, Yancey, King & Galloway, Herschel E. Richard, Jr., Glenn L. Langley, and William C. Kalmbach III; Murphy, Weir & Butler, Penn Ayers Butler, and Tobias S. Keller, for Respondents Commercial National Bank in Shreveport, First Tennessee Bank National Association, First Interstate Bank of Denver, N.A., Norwest Bank, Minnesota, N.A., and Texas Commerce Bank, El Paso, N.A.

Pachulski, Stang, Ziehl & Young, Thomas E. Musselman, Iain A. W. Nasatir and Larry W. Gabriel, for Respondents Group Annuity Participant Protection Association, State Street Bank & Trust Company, Underwriters Laboratories, Inc., Chelsea Industries, Inc., and British Gas Exploration Production, Inc.

Brobeck, Phleger & Harrison, G. Larry Engel, Kent M. Roger, Esther H. Pang and David M. Higgins, for Respondents CoCARE and The Official Allocated Annuities Committee.

Daniel Lungren, Attorney General, and Edmond B. Mamer, Deputy Attorney General; Rubinstein & Perry, Karl L. Rubinstein, Dana Carli Brooks, Melissa S. Kooistra, and Robert H. Nunnally, Jr., for Insurance Commissioner of the State of California.

Executive Life Insurance Company (ELIC) sold Municipal Bond Guaranteed Investment Contracts (Muni-GICs) to two banks. When the banks failed, the Federal Deposit Insurance Corporation (FDIC) placed them in receiverships and transferred their assets (including the ELIC Muni-GICs) to successor banks which, in turn, became creditors in ELIC's subsequent conservatorship proceedings. To obtain priority over other claimants, the banks contend their ephemeral involvement with the FDIC clothed them with the aura of a governmental entity. The trial court disagreed and so do we.

FACTS

In 1986, InterFirst Bank Houston, N.A. (a Texas bank) and Capital Bank & Trust Co. (a Louisiana bank), as trustees acting for the benefit of municipal bondholders, invested funds in ELIC's Muni-GICs. InterFirst invested about $295 million and Capital invested about $150 million.[1]

On October 30, 1987, by court order, Capital was declared insolvent and placed in receivership by the

[1] Under separate trust indenture agreements, InterFirst and Capital were the trustees for funds obtained from the sale of municipal bonds, the proceeds of which were to be used to finance low-income housing (for InterFirst's beneficiary, The Southeast Texas Housing Finance Corporation, SETHFCO) and agricultural loans (for Capital's beneficiary, the Louisiana Agricultural Finance Authority, LAFA). Under the indenture agreements (which are contracts between the municipal bond issuers and their indenture trustee-banks), the trustees were expressly obligated to purchase one or more ELIC Muni-GICs. In 1986, ELIC issued eight Muni-GICs (only three are involved in this case), for a total consideration of about $1.8 billion. The Muni-GICs required ELIC to make specified interest payments and permitted the trustees to withdraw accumulated interest (which could then be used to service the debt on the bonds and to finance the low-income housing and agricultural loans). At maturity, ELIC was to return to the trustees their initial investments and any unpaid interest. SETHFCO and LAFA were third-party beneficiaries of the Muni-GICs which are the subject of these proceedings.

FDIC. That same day, the FDIC organized a "bridge bank," Capital Bank & Trust Co., N.A. (CBTNA).[2] CBTNA, in turn, entered into a purchase and assumption agreement, pursuant to which Capital's trust business was transferred to CBTNA by the receiver (the FDIC), which made CBTNA the successor trustee under the LAFA trust indenture and the holder of the ELIC Muni-GICs. On May 23, 1988, Grenada Sunburst System Corporation acquired CBTNA pursuant to an agreement which resulted in the merger of CBTNA and Sunburst Bank, a wholly-owned subsidiary of Grenada. To induce the merger and the transfer of CBTNA's trust assets (including the ELIC Muni-GICs) to Sunburst, the FDIC indemnified Sunburst for all losses arising from the acquisition agreement, including any claims by Capital's creditors. Since that time, Sunburst has served as the successor trustee of LAFA's ELIC Muni-GICs.

Meanwhile, during June 1987, InterFirst merged with First RepublicBank of Houston, N.A. On July 29, 1988, by court order, RepublicBank was placed in FDIC receivership. The same day, pursuant to a purchase and assumption agreement, the FDIC (as receiver) transferred some of RepublicBank's assets and trust business (including the ELIC Muni-GICs) to JRB Bank, N.A., a bridge bank created by the FDIC for that purpose. The bridge bank became the successor trustee under the SETHFCO trust indenture and the holder of the ELIC Muni-GICs. Later the same day, the FDIC accepted the bid of NCNB Corporation to purchase the bridge bank's stock. To induce NCNB to make the purchase, the FDIC promised financial assistance to NCNB and its affiliates and, as part of that assistance, agreed to indemnify NCNB Texas National Bank—the renamed bridge bank—against any losses, liabilities or expenses it might later incur in

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[2] The FDIC is authorized by statute to establish a "bridge bank" to take over the assets and liabilities of a failed bank and to carry on its business for a limited period while an agreement is worked out with a purchasing bank. (12 U.S.C. § 1821, subd. (n).)

any proceeding as a result of the assumption. Since that time, NCNB Texas (later renamed NationsBank of Texas, N.A.) has served as the successor trustee of SETHFCO's ELIC Muni-GICs.

On April 11, 1991, the California Insurance Commissioner, acting under the authority of section 1011 of the Insurance Code,[3] asked the Los Angeles Superior Court to place ELIC into conservatorship. The unopposed request was granted, the Commissioner was named as the conservator and, among other things, a moratorium was imposed on payments to the Muni-GIC trustees. In August, the Commissioner submitted a proposed rehabilitation plan which established priorities among claimants according to a schedule which placed Muni-GICs at the bottom of the ladder (Class 6), below ELIC's non-Muni-GIC policyholders (who were placed in Class 5). (§ 1033, subd. (a).)[4] Under this proposed plan, the ELIC policies with Class 5 priority were to be transferred to the newly-

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[3] Unless otherwise stated, all section references are to the Insurance Code.

[4] Subdivision (a) of section 1033 lists the order of "[p]riorities in allowance of claims" against an insolvent insurer:

"(a) Claims allowed in [an insolvency] proceeding shall be given preference in the following order:

"(1) Expense of administration.

"(2) Unpaid charges due under provisions of Section 736 [expenses incurred by the Commissioner in examining the insurer's business and affairs].

"(3) Taxes due to the State of California.

"(4) Claims having preference by the laws of the United States and by laws of this state.

"(5) All claims of the California Insurance Guarantee Association, the California Life and Health Insurance Guarantee Association, and associations or entities performing a similar function in other states, together with claims for refund of unearned premiums and all claims of policyholders of an insolvent insurer that are not covered claims. . . .

"(6) All other claims."

created Aurora National Life Insurance Company, which would issue new policies equal to about 80 percent of the value of the original policies. ELIC annuity contracts and "Pension-GICs" (GICs issued by ELIC to employee pension funds) were given Class 5 priority.

In the fall of 1991 (while the rehabilitation plan was pending before the trial court), Sunburst and NationsBank sued ELIC and the Commissioner, seeking a declaration that their Muni-GICs were entitled to "at least" the Class 5 priority given to other annuities and Pension-GICs under the proposed rehabilitation plan. In an amended complaint, Sunburst alleged its claim was entitled to Class 4 priority—on the theory that the FDIC, as a government entity, was entitled to Class 4 priority and that, therefore, so was Sunburst because the FDIC's momentary possession of Sunburst's Muni-GICs had, by an actual or implied assignment or other alchemy, bestowed upon Sunburst the right to walk in the FDIC's shoes. Following a mid-November trial on the proposed rehabilitation plan, the trial court ruled that the Muni-GICs were entitled to Class 5 priority but postponed a ruling on Sunburst's request for Class 4 priority.

In January 1992, the Commissioner submitted a revised rehabilitation plan which, in conformance with the trial court's ruling, included the Muni-GICs in Class 5. Under this plan, all Class 5 claimants would receive about 70 percent of the value of their claims (as opposed to the 80 percent contemplated under the original plan). (See *Texas Commerce Bank* v. *Garamendi* (1992) 11 Cal. App.4th 460.)

On January 10, NationsBank amended its declaratory relief complaint to assert a right to Class 4 priority for its Muni-GIC on the same theory as Sunburst and, in February, Sunburst and NationsBank moved for summary judgment. The Commissioner, several other Class 5 claimants, and the other Muni-GIC holders who had not acquired their Muni-GICs from or through the FDIC,

all opposed the motion, and the Commissioner also filed a cross-motion for summary judgment. The trial court denied the Banks' motions, granted the Commissioner's motion, and entered judgment against NationsBank and Sunburst in their declaratory relief actions, finding their Muni-GICs were not entitled to Class 4 priority. NationsBank and Sunburst appeal.[5]

DISCUSSION

NationsBank and Sunburst contend their claims are entitled to Class 4 priority because they have a preference under federal law. Although we are inclined to disagree, the point is immaterial—because even assuming the FDIC would have had a right to priority if it was a party litigant, no such right was assigned or otherwise transferred to the Banks.

Introduction

Class 4 priority is available only for those claims "having preference by the laws of the United States and by laws of this state." (§ 1033, subd. (a)(4).) To bring

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[5] On July 31, the trial court approved the revised reorganization plan and authorized the immediate transfer of assets from ELIC to Aurora. NationsBank and Sunburst also appealed from that order (No. B071799), and from a November 25 order which stands or falls with the July 31 order (No. B072863). The parties agree (and so do we) that Division Four's decision in *Commercial Nat. Bank* v. *Superior Court* (1993) 14 Cal.App.4th 393, which vacates the July 31 order, makes these other appeals moot and we therefore dismiss them on that ground, limiting our discussion on this appeal to the priority issue raised on the cross-motions for summary judgment.

Following the decision in *Commercial Nat. Bank* v. *Superior Court, supra,* 14 Cal.App.4th 393, the Commissioner proposed a new plan, which the trial court approved. The new plan was the same as the earlier plan insofar as this case is concerned (it reiterated the judgments denying Class 4 status to NationsBank and Sunburst) and, to play it safe, the Banks filed a new notice of appeal (No. B079406). The issues are the same and that appeal has therefore been consolidated with the appeals from the summary judgments.

themselves within this category, the Banks claim a preference under Title 31 U.S.C. section 3713, subdivision (a)(1), which provides (as relevant) that a "claim of the United States Government shall be paid first when . . . a person indebted to the Government is insolvent and . . . an act of bankruptcy is committed . . . ."

The Banks' syllogism is this: Federal policy promotes "a healthy and solvent national banking system," including efforts by the FDIC to protect the assets of insolvent financial institutions by encouraging asset assignments to new banks which, in turn, provide uninterrupted service to the public. Federal law (including 31 U.S.C. § 3713, subd. (a)(1)) gives the FDIC the tools to implement such transfers, by bestowing upon the FDIC "the right to assert a federal law priority in an insolvency proceeding" such as ELIC's conservatorship. California law (§ 1033, subd. (a)(4)) recognizes this right by permitting claims made under "the laws of the United States" to be paid ahead of most other claims "because claims that may affect the public fisc are entitled to satisfaction before private parties may be reimbursed." The FDIC's functions are "fundamentally governmental" and, under "settled assignment principles, NationsBank and Sunburst, the FDIC's assignees, are entitled to assert a [C]lass 4 priority as well." According to NationsBank and Sunburst, the fact that ELIC's indebtedness and "act of bankruptcy" (the conservatorship) are admitted means there are only two questions to be decided in this case—whether the FDIC is entitled to assert a federal priority and, if so, whether the Banks can do so as their assignees.

Priority

According to the Banks, the FDIC is entitled to priority because it is both (1) an "integral part of the governmental mechanism" created to accomplish something Congress deemed to be of national importance (*Small Business Adm'n.* v. *McClellan* (1960) 364 U.S. 446,

450) and (2) its activities affect the federal treasury (cf. *Federal Home Loan Mortgage Corp.* v. *Superior Court* (1990) 224 Cal.App.3d 218, 222-223). Since other "federally chartered corporations" which meet these criteria have been held to be federal agencies or instrumentalities (*Rust* v. *Johnson* (9th Cir. 1979) 597 F.2d 174, 177-178 [Federal National Mortgage Association]; *U.S.* v. *Rivieccio* (E.D.N.Y. 1987) 661 F.Supp. 281, 287-288 [National Credit Union Administration]; *Fed. Land Bank of Wichita* v. *Bd. of County Com'rs* (D. Colo. 1984) 582 F.Supp. 1507, 1511 [Federal Land Bank]), the same result should follow as to the FDIC—because the FDIC performs important governmental functions by regulating banks, insuring deposits, and minimizing the effect of bank failures on the national banking system. For these and related reasons, the Banks conclude, the FDIC is entitled to Class 4 priority.

According to the Commissioner and the other Muni-GIC owners, the Banks' argument ignores the fact that the FDIC has three distinct roles—one as regulator (12 U.S.C. § 1820, subd. (g)), one as corporate insurer of deposits (12 U.S.C. § 1811 et seq.), and one as receiver of failed banking institutions (12 U.S.C. § 1821, subd. (c).)[6] In the latter context (as in this case), the FDIC stands in the shoes of the insolvent bank (*Federal Deposit Insurance Corporation* v. *Glickman* (9th Cir. 1971) 450 F.2d 416, 418) and acquires the rights and duties of that institution (*F.D.I.C.* v. *Wheat* (5th Cir. 1992) 970 F.2d 124, 130), no more and no less. For this reason, the FDIC (wearing its receiver hat) is not a federal instrumentality for purposes of the Tax Injunction Act (28 U.S.C. § 1341, which precludes a federal court from

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[6] "The FDIC's roles as receiver and as corporate insurer are distinct. In its capacity as receiver, the FDIC is obligated to marshal the assets of the failed bank for the benefit of the bank's creditors and shareholders. In its corporate capacity, the FDIC is obligated to insure the failed bank's deposits." (*Federal Deposit Ins. Corp.* v. *Hatmaker* (6th Cir. 1985) 756 F.2d 34, 36, fn. 2.)

interfering with the collection of state taxes) or the Eleventh Amendment of the United States Constitution. (*Federal Deposit Ins. Corp.* v. *State of N.Y.* (2d Cir. 1991) 928 F.2d 56; *PIMA Financial Serv.* v. *Intermountain Home Systems* (D. Colo. 1992) 786 F.Supp. 1551, 1560-1561.) A fortiori (according to the Commissioner and the other Muni-GIC owners), the FDIC does not have a right to priority over ELIC's other policyholders—because the FDIC can have no greater rights than its assignors, Capital and RepublicBank.[7]

Having stated the issue, we move on without deciding it, leaving it to another court at another time to resolve an apparent conflict in the cases. As we will explain, the FDIC's failure to assign to the Banks any right of its own (as opposed to the rights and assets of the failed banks) defeats the contention that, assuming the FDIC

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[7] For an interesting mix of cases, see *Lapadula & Villani, Inc.* v. *United States* (S.D.N.Y. 1983) 563 F.Supp. 782, 784 [the public treasury is unaffected by the FDIC's success or failure in recovering debts owed to it as successor to the claims of a failed bank, which means the FDIC is not an integral part of the governmental mechanism but rather a separate legal entity serving essentially a proprietary rather than a sovereign function, which means it is not entitled to priority]; *PIMA Financial Serv.* v. *Intermountain Home Systems, supra,* 786 F.Supp. 1551, 1560-1561; and compare *Federal Home Loan Mortgage Corp.* v. *Superior Court, supra,* 224 Cal.App.3d at p. 224, fn. 2 [without distinguishing the FDIC's separate corporate and receiver functions, Division Seven of our court suggested, in dicta, that the FDIC's actions always affect the public fisc]; *Engleman* v. *Commodity Credit Corp.* (S.D. Cal. 1952) 107 F.Supp. 930, 932-936 [interpreting an earlier version of the priority statute to require the simultaneous occurrence of the elements of 31 U.S.C. § 3713, an (1) insolvent person who (2) is indebted to the government (3) commits an act of bankruptcy]; *In re Big 'D'iscount Stores, Ltd.* (Bankr. D.S.C. 1976) 2 Bankr. Ct. Dec. 1073 [the FDIC, while serving as receiver, was nevertheless acting in its "separate corporate capacity" when it purchased (for itself, not through a bridge bank) an asset of a failed bank]; see also 12 U.S.C. § 1821, subd. (n)(6)(A) [a bridge bank is not an agency, establishment or instrumentality of the United States].)

would itself have had a right to priority in this case, any such right was transferred to NationsBank or Sunburst.

Assignment

Assuming for discussion that the FDIC could, in this litigation, assert a claim to federal priority on its own behalf, no such right was assigned or otherwise transferred to the Banks.[8]

As to both NationsBank and Sunburst, the purchase and assumption agreements provided, in identical language, that: "The Assuming Bank hereby accepts from

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[8] Implicit in the Banks' assignment argument is their assumption that a governmental entity's priority rights are assignable. Our rejection of the Banks' ultimate conclusion (by our holding that there was no assignment) does not include our acceptance of this underlying hypotheses. All we have done is cut to the chase. (See *I.C. Herman & Co., Inc.* v. *Taub, Hummel & Schnall, Inc.* (2d Cir. 1974) 497 F.2d 1301, 1302 [in bankruptcy proceedings, a customs broker who advances customs duties for an importer is not entitled to succeed to the rights of the United States against the bankrupt importer, and the broker thus cannot assert the government's right to have its claim accorded priority status in the distribution of the bankrupt's estate]; *White* v. *Moriarty* (1993) 15 Cal.App.4th 1290, 1298 [an assignee of the FDIC is entitled to the benefit of the federal statute of limitations when it enforces a failed bank's note].) While the customs case is factually distinguishable because it does not involve an assignment, the limitations case is equally distinguishable (or more so). The availability of a longer period of limitations in an action between an assignee of an insolvent bank and a debtor of the same bank does no more than extend the period during which those parties can litigate their rights vis-á-vis each other. There are miles to go before reaching the Banks' conclusion, which would permit the assignee of a failed bank to claim priority in an action involving parties who had no relationship at all with the failed bank and who, by pure chance, are attempting to collect from the same third party debtor as the Banks. (See also *S.E.C.* v. *Albert & Maguire Sec. Co., Inc.* (3d Cir. 1977) 560 F.2d 569, 573 [bank receiving assignment of customer's priority claim in Securities Investor Protection Act liquidation could not assume preferred status because it would result in an "inequitable distribution" of the estate].)

the Receiver an assignment of, and the Receiver hereby sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest of the Receiver *in and to all of the following assets of the* [*Failed*] *Bank* . . . ." (Emphasis added.) The listed assets included the failed banks' "trust business" and the trust business, in turn, included the ELIC Muni-GICs. More specifically, each agreement provided, "with Respect to Trust Business," that the "Assuming Bank shall . . . succeed to the rights, obligations, properties, assets, investments, deposits, agreements and trusts of the [Failed] Bank . . ., *all to the same extent as though the Assuming Bank had originally assumed the same* . . . ." (Emphasis added.) In neither agreement is there an assignment of *anything* belonging to the FDIC.

These agreements did not confer on NationsBank or Sunburst any claim of priority the FDIC might have had. While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifest an intention to transfer the right. (Rest.2d Contracts, § 324; *Cockerell* v. *Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291.) Nothing in the purchase and assumption agreements establishes or even suggests an intent by the FDIC to assign to the Banks a right belonging to the FDIC qua FDIC. Quite the opposite intent is manifested by the provision that the assignment of the failed bank's trust assets was made "to the same extent as though" NationsBank and Sunburst "had originally assumed" those assets from the failed banks, without any involvement by the FDIC. (Rest.2d Contracts, § 203, subd. (c) ["specific terms and exact terms are given greater weight than general language]; *Furtado* v. *Metropolitan Life Ins. Co.* (1976) 60 Cal.App.3d 17, 25.)

The Banks' reliance on *D'Oench, Duhme & Co.* v. *F.D.I.C.* (1942) 315 U.S. 447, is misplaced. In *D'Oench, Duhme,* the Supreme Court created a rule of estoppel to

prevent a failed bank's borrowers from asserting against the FDIC and its assignees a defense based upon a secret or unrecorded agreement, on the theory that the FDIC must be able to value a failed bank by reference to its books and records, free from concerns about undisclosed side deals. (See *Bell & Murphy & Assoc.* v. *InterFirst Bank Gateway* (5th Cir. 1990) 894 F.2d 750, 754.) The *D'Oench, Duhme* doctrine (now codified in 12 U.S.C. § 1823, subd. (e)) may bar many claims and defenses which would defeat or diminish the FDIC's rights in and to an acquired asset, and it may sometimes be extended to benefit the FDIC's assignees (*Cadle Co. II, Inc.* v. *Lewis* (Kan. 1993) 864 P.2d 718, 720-721). But the doctrine has never been applied in the manner suggested by NationsBank and Sunburst, which would create an implied assignment bestowing upon an assignee of the FDIC a governmental priority over other claimants. (Compare *White* v. *Moriarty, supra,* 15 Cal.App.4th at pp. 1297-1298 [following the federal cases which have implied an assignment of the FDIC's right to a six year period of limitations without discussion of the terms of the parties' purchase and assignment agreement].) Since the parties have demonstrated their ability to draft an assignment with specificity, and since the equities of this case do not favor a finding of implied assignment, we decline the Banks' invitation to extend the *D'Oench, Duhme* doctrine.

In short, the fleeting presence of the FDIC in the chain of possession of the Muni-GICs now owned by NationsBank and Sunburst did not transmogrify the Banks' claims into claims of the United States government.[9]

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[9] The fact that the FDIC indemnified NationsBank and Sunburst against the claims of their predecessors' creditors adds nothing. An agreement to indemnify is not an assignment of a right. For this reason, we deny the Banks' request that we judicially notice documents from other lawsuits in which the FDIC apparently has agreed to contribute to obligations otherwise payable (if at all) by NationsBank and Sunburst. Aside from the fact

DISPOSITION

The appeals from the July 31, 1992, and November 25, 1992, orders (Nos. B071799 and B072863) are dismissed. The judgments denying Class 4 priority to the claims made by NationsBank and Sunburst (Nos. B070030 and B070031) and the subsequent order incorporating those judgments (No. B079406) are affirmed.

CERTIFIED FOR PUBLICATION.

VOGEL (Miriam A.), J.

We concur:

SPENCER, P.J.

MASTERSON, J.

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that these documents were not before the trial court and thus ought not to be considered by us (*Carleton* v. *Tortosa* (1993) 14 Cal.App.4th 745, 753-754, fn. 1), they are irrelevant.

APPENDIX C

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, Clerk

Division: 1 Date: 05/27/94

Crosby, Heafey, Roach & Way
Paul D. Fogel
1999 Harrison Street
Oakland, CA. 94612

RE: Sunburst Bank
vs.
Executive Life Insurance Company
Garamendi, John (Insurance Commissioner)
2 Civil B070030
Los Angeles NO. BC033211

THE COURT:

Petition for rehearing denied.

APPENDIX D

DEPT. 67

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

April 29, 1992

HONORABLE KURT J. LEWIN, Judge

BC 037 933

NATIONSBANK OF TEXAS, N.A.,
a national banking association

vs.

EXECUTIVE LIFE INSURANCE COMPANY,
a California Corporation,
JOHN GARAMENDI, as Insurance Commissioner

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MOTION

ON THE MOTIONS FOR SUMMARY JUDGMENT BROUGHT BY PLAINTIFF AND DEFENDANT RESPECTIVELY, HERETOFORE ARGUED AND SUBMITTED; THE COURT NOW RULES AS FOLLOWS:

RULING ON SUBMITTED MATTER

Plaintiff NationsBank of Texas has failed to establish a priority under *31 United States Code § 3717*. NationsBank's claim is not a claim of the United States and was not transmogrified into such by the FDIC's intervention.

Plaintiff was unable to designate any authority to that effect throughout the voluminous appendix of non-California authority submitted.

Counsel for plaintiff also acknowledged, even asserted, that it had no exposure to the individual bondholders for any shortfall in the amounts claimed under the GIC securing the payment and redemption of the bonds. Plaintiff was at all times and remains a conduit for the bondholders who are the real parties in interest.

For the forgoing reasons and the Court's reasoning articulated at the hearing on the motion, and for the reasons more particularly set out in the defendant Commissioner's Memorandum of Points and Authorities Plaintiff's Motion for Summary Judgment is denied and the defendant's Motion for Summary Judgment is granted.

Counsel for defendant is ordered to prepare, serve and submit a proposed Judgment consistent with this Ruling.

A COPY OF THIS MINUTE ORDER IS MAILED THIS DATE BY U.S. MAIL ON ALL APPEARING COUNSEL.

APPENDIX E

[Filed Jun. 11, 1992]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

No. BC037933

NATIONSBANK OF TEXAS, N.A.,
a national banking association,
Plaintiff,

vs.

EXECUTIVE LIFE INSURANCE COMPANY, a California corporation, and JOHN GARAMENDI, as Insurance Commissioner of the State of California,
Defendants.

JUDGMENT

This case having come on for trial on September 30, 1991, the Honorable Kurt J. Lewin, sitting without a jury, presiding; plaintiff NationsBank of Texas, N.A., f/k/a NCNB Texas National Bank, having appeared through its counsel, Pillsbury Madison & Sutro and Daniel & Lezar; defendants Executive Life Insurance Company and John Garamendi, as Insurance Commissioner of the State of California, having appeared through their counsel, the Attorney General of the State of California and Rubinstein & Perry; intervenor Xerox Corporation, as Plan Sponsor of Xerox Corporation Profit Sharing and Savings Plan, having appeared through its counsel, Barger & Wolen and Buchalter, Nemer, Fields & Younger; intervenors State Street Bank & Trust Company, Underwriters Laboratories, Inc., British Gas Exploration and Produc-

tion, Inc. and Chelsea Industries having appeared through their counsel, Buchalter, Nemer, Fields & Younger; the Official Allocated Annuities Committee having appeared through its counsel, Brobeck, Phleger & Harrison; Certain Structured Settlement Annuitants, Michael Barr, Regelio Cruz, Lawrence DeBurr, James C. Johnson, Michael Wayne Puente, Lois Moore, Clay Robbins, Margie Johnson, Laurie Rosenbaum/Richard Kissman (Cheryl Kincannon, a minor), Nancy Noret Moore and Jason Clay Moore having appeared through their counsel, Marie Collins; Janet Virgin, Timothy C. Devlin and Marie Devlin, Catholic Life Insurance Union, Medina Banking Company of Medina, Tennessee, Bank of Bolivar of Bolivar, Tennessee, Alamo Bank of Texas, San Juan State Bank and First Interstate Bank of Commerce having appeared through their counsel, Corinblit & Seltzer, Lovey Dannenberg Bemporad & Selinger and Sheinfeld, Maley & Kay; evidence, both oral and documentary, having been presented by all the parties, including the intervenors, and the cause having been argued and submitted for decision; the Court having filed its Statement of Decision on November 15, 1991; the Court having denied on January 9, 1992, the motion to vacate the Statement of Decision made by the National Organization of Life and Health Insurance Guaranty Associations, the California Life Insurance Guaranty Association, the Illinois Life and Health Insurance Guaranty Association, the Florida Life and Health Insurance Guaranty Association and the Pennsylvania Life and Health Insurance Guaranty Association, through their counsel Hopkins & Sutter and Parker, Milliken, Clark, O'Hara & Samuelian; and the Court having heard argument on April 16, 1992 on cross-motions for summary judgment on the first Cause of Action of the First Amended Complaint, and having filed its Ruling on Submitted Matter on April 29, 1992:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. For the reasons stated in this Court's November 15, 1991 Statement of Decision, the Muni GIC issued by Executive Life Insurance Company to plaintiff NationsBank of Texas (policy no. GIC 01169) is properly included in section 1033, Subd. (a)(5) as a priority 5;

2. Plaintiff NationsBank of Texas, N.A. is not entitled to a priority under 31 U.S.C. section 3713; and

3. Costs to be determined pursuant to court order.

Date: Jun. 11, 1992.

/s/ Kurt J. Lewin
KURT J. LEWIN
Judge of the Superior Court

APPENDIX F

PURCHASE AND ASSUMPTION AGREEMENT

BETWEEN

FEDERAL DEPOSIT INSURANCE CORPORATION
RECEIVER OF FIRST REPUBLICBANK HOUSTON
NATIONAL ASSOCIATION

and

JRB BANK, NATIONAL ASSOCIATION

DATED AS OF

July 29, 1988

PURCHASE AND ASSUMPTION AGREEMENT

THIS AGREEMENT, made and entered into this 29 day of July, 1988, by and between the FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST REPUBLICBANK HOUSTON, NATIONAL ASSOCIATION, HOUSTON, TEXAS, formerly an insured bank within the meaning of the Federal Deposit Insurance Act (12 U.S.C. Section 1811, *et seq.*), organized under the laws of the United States of America (the "Receiver") and JRS Bank, National Association, an insured bank within the meaning of the Federal Deposit Insurance Act, organized and existing under the laws of the United States of America and having its principal place of business in Dallas, Texas (the "Assuming Bank").

WITNESSETH:

WHEREAS, First RepublicBank Houston, National Association, Houston, Texas (the "Failed Bank") has been closed by the Office of the Comptroller of the Cur-

rency (the "Comptroller") pursuant to 12 U.S.C. Section 191; and

WHEREAS, pursuant to 12 U.S.C. Section 191 and Section 1821(c) the Comptroller has appointed the Receiver; and

WHEREAS, pursuant to 12 U.S.C. Section 1821(i), as amended, the Federal Deposit Insurance Corporation (the "Corporation") has caused the Assuming Bank to be organized as a bridge bank upon the determination pursuant to 12 U.S.C., Section 1821(i)(B) and (C) that the continued operation of the Failed Bank is essential to provide adequate banking services in the community where it is located and that the continued operation of the Failed Bank is in the best interest of the depositors of the Failed Bank and the public; and

WHEREAS, pursuant to this Purchase and Assumption Agreement, the Assuming Bank acquires certain assets of, and assumes the deposits and certain other liabilities of, the Failed Bank; and

WHEREAS, pursuant to 12 U.S.C. Section 1823 (c)(2)(A), the Corporation may provided assistance to the Assuming Bank to facilitate the transactions contemplated by this Purchase and Assumption Agreement, which assistance may include indemnification of the Indemnitees (as defined in the Indemnity Agreement, which term includes the Assuming Bank) under the Indemnity Agreement (as hereinafter defined), and indemnification of certain directors, officers and employees of the Assuming Bank under certain Agreements Concerning Indemnity pursuant to 12 U.S.C. Section 1823(c)(2)(A) upon the determination of the Board that any one of the requisite conditions set forth in 12 U.S.C. Section 1823 (c)(4)(A) exists; and

WHEREAS, the Board has determined pursuant to 12 U.S.C. Section 1823(c)(4)(A) that the continued opera-

tion of the Failed Bank is essential to provide adequate banking services in its community; and

WHEREAS, the Corporation has indemnified the Indemnities as provided in the Indemnity Agreement pursuant to 12 U.S.C. Section 1823(c)(2)(A); and

WHEREAS, pursuant to a Contract of Sale of even date herewith by and between the Receiver and the Corporation, the Receiver has sold and assigned certain assets of the Failed Bank to the Corporation.

NOW, THEREFORE, in consideration of the mutual promises herein set forth and other valuable consideration, the Receiver and the Assuming Bank hereby agree as follows:

* * * *

ARTICLE III

PURCHASE OF ASSETS

3.1 *Assets Purchased.* The Assuming Bank hereby accepts from the Receiver an assignment of, and the Receiver hereby sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest of the Receiver in and to all of the following assets of the Failed Bank (which shall be recorded at Book Value), which is based upon the best information available as of Bank Closing and which shall be adjusted as provided in Article VI of this Agreement:

(a) cash and receivables from banks and any accrued interest thereon, including cash items in the process of collection;

(b) securities and any accrued interest thereon;

(c) federal funds sold and securities purchased under agreements to resell, if any, and any accrued interest thereon;

(d) Loans;

(e) Other Real Estate;

(f) credit card plan and other revolving credit plans;

(g) Safe Deposit Boxes and related business;

(h) safekeeping business, if any;

(i) trust business, if any;

(j) Subsidiaries, to the extent of any ownership interest therein;

(k) Owned Bank Premises, subject to leases, if any, of such premises between the Failed Bank and the Federal Reserve Bank of Dallas;

(l) Fixtures owned by the Failed Bank associated with Owned Bank Premises or Leased Bank Premises;

(m) Furniture and Equipment owned by the Failed Bank associated with Owned Bank Premises or Leased Bank Premises;

(n) Records and other documents as provided in Section 7.1 of Article VII of this Agreement; and

(o) any other asset including real property of the Failed Bank, *exclusive* of any

(i) action, judgment or claim of the Receiver against (a) any officer, director, employee, accountant, attorney, or any other Person employed or retained by the Failed Bank on or prior to Bank Closing arising out of any act or omission of such Person in such capacity, (b) any underwriter of financial institution bonds, bankers blanket bonds or any other insurance policy of the Failed Bank, (c) any shareholder or holding company of the Failed Bank or (d) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on an extension of credit from the Failed Bank)

incurred by the Failed Bank; provided, that for purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing, regardless of when any such claim is discovered and regardless of whether any such claim is made with respect to a financial institution bond, bankers blanket bond or other insurance policy of the Failed Bank in force as of Bank Closing;

(ii) Leased Bank Premises, subject to Section 4.4 of Article IV of this Agreement;

(iii) Fixtures and Leasehold Improvements leased by the Failed Bank associated with Leased Bank Premises, subject to Section 4.5 of Article IV of this Agreement;

(iv) Fixtures leased by the Failed Bank associated with Owned Bank Premises, subject to Section 4.5 of Article IV of this Agreement; and

(v) Furniture and Equipment leased by the Failed Bank associated with Leased Bank Premises, subject to Section 4.5 of Article IV of this Agreement, or Owned Bank Premises.

* * * *

ARTICLE IV

ASSUMPTION OF CERTAIN DUTIES AND OBLIGATIONS

* * * *

4.7 *Agreement With Respect to Trust Business.* The trust business of the Failed Bank is hereby transferred to the Assuming Bank effective as of Bank Closing.

(a) The Assuming Bank shall, without further transfer, substitution, act or deed, to the full extent permitted by law, succeed to the rights, obligations, properties, as-

sets, investments, deposits, agreements and trusts of the Failed Bank under (i) trusts, executorships, administrations, guardianships, agencies and (ii) other fiduciary or representative capacities, all to the same extent as though the Assuming Bank had originally assumed the same; provided, that any liability based on the malfeasance or nonfeasance of the Failed Bank, its directors, officers, employees or agents with respect to the trust business of the Bank which has not been certified by the Receiver in accordance with Section 2.1(k) of Article II of this Agreement is not assumed hereunder.

(b) The Assuming Bank shall, to the full extent permitted by law, succeed to, and shall be entitled to take and execute, the appointment to all executorships, trusteeships, guardianships and other fiduciary or representative capacities to which the Failed Bank is or may be named in wills, whenever probated, or to which the Failed Bank is or may be named or appointed by any other instrument.

(c) In the event additional proceedings of any kind are necessary to accomplish the transfer of such trust business (including the appointment by any court of the Assuming Bank as successor to the Failed Bank in any fiduciary or representative capacities), the Assuming Bank, at its own expense, agrees that it will take whatever action is necessary to accomplish such transfer. The Receiver agrees to use its reasonable best efforts to assist the Assuming Bank in accomplishing such transfer.

* * * *

13.4 *Governing Law.* This Agreement and the rights and obligations hereunder shall be governed by and construed in accordance with the federal law of the United States of America, and in the absence of controlling federal law, in accordance with the laws of the State of Texas.

* * * *

APPENDIX G

PERTINENT STATUTORY PROVISIONS

The Competitive Equality Banking Act of 1987, 101 Stat. 552, 629, amended the Federal Deposit Insurance Act to provide as follows:

> (1) When an insured bank is closed, the [Federal Deposit Insurance] Corporation, in the Corporation's discretion, and subject to the conditions established in (2), may establish a bridge bank to—
>
> * * * *
>
> (C) purchase such assets of the closed bank as the [FDIC] may, in its discretion, determine to be appropriate.
>
> * * * *
>
> (3)(A) Upon the organization of a bridge bank pursuant to this subsection, the [FDIC], as receiver * * * may, subject to the approval of any such transfer by a court of competent jurisdiction, transfer any assets and liabilities of the closed insured bank to the bridge bank.

12 U.S.C. §§ 1821(i)(1)(C), (3)(A) (1988), now codified, as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), as 12 U.S.C. §§ 1821(n)(1)(B)(iii), (3)(A) (Supp. III 1991).

Title 31, Section 3713(a)(1) of the United States Code provides as follows:

> A claim of the United States Government shall be paid first when—
>
> (A) a person indebted to the Government is insolvent and—
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

No. 94-888

Supreme Court, U.S.
FILED
DEC 16 1994
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

NationsBank of Texas, N.A.,
Petitioner,

v.

Executive Life Insurance Company, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

---

RESPONDENTS' BRIEF IN OPPOSITION

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Texas Commerce Bank, National Association

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29 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the California Court of Appeal err in construing language of limitation in one clause of a particular contract involving the assignment of rights by the Federal Deposit Insurance Corporation, where the Court of Appeal's result is correct under the plain language of 31 U.S.C. § 3713?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Commercial National Bank in Shreveport states that its parent corporation is Commercial National Corporation, which in turn is wholly-owned by Deposit Guaranty Corp. Commercial National Bank in Shreveport has no subsidiaries other than wholly-owned subsidiaries.

Texas Commerce Bank National Association states that its parent corporation is Texas Commerce Equity Holdings, Inc., which in turn is wholly-owned by Texas Commerce Bancshares, Inc., which in turn is wholly-owned by Chemical Banking Corporation. Texas Commerce Bank National Association has no subsidiaries other than wholly-owned subsidiaries.

First Tennessee Bank National Association states that its parent corporation is First Tennessee Bank National Corp. First Tennessee Bank National Association has no subsidiaries other than wholly-owned subsidiaries.

First Interstate Bank of Denver, N.A. states that its parent corporation is First Interstate Bancorp. First Interstate Bank of Denver, N.A.'s only subsidiary, other than wholly-owned subsidiaries, is PMP Enterprises, Inc.

Norwest Bank Minnesota, N.A. states that its parent corporation is Norwest Corporation. Norwest Bank Minnesota, N.A.'s only subsidiary, other than wholly-owned subsidiaries, is Crestone Capital Management, Inc.

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COUNTERSTATEMENT OF THE CASE

A. Introduction

The facts of this case are clearly stated by the California Court of Appeal (the "Court of Appeal"). (Pet. 4a-8a). Simply put, seven banks, in their capacity as indenture trustees, own guaranteed investment contracts ("GICs") issued by the now-failed Executive Life Insurance Company ("Executive Life"). In the conservatorship of Executive Life all seven banks were classified as policyholders of Executive Life and recognized as having equal rights in the assets of company. *Texas Commerce Bank v. Garamendi*, 11 Cal. App. 4th 460, 14 Cal. Rptr. 2d 854 (1992). Because one of those banks, petitioner, acquired certain assets from the Federal Deposit Insurance Company ("FDIC"), including an Executive Life GIC which was owned by the FDIC as indenture trustee, it claimed a priority over identically-situated Executive Life claimants, based on the federal insolvency statute, 31 U.S.C. § 3713.[1] The trial court and the Court of Appeal rejected petitioner's claim, and the petition for a writ of certiorari followed.

---

[1]Sunburst Bank also acquired its GIC from the FDIC and claimed a priority over similarly-situated creditors of Executive Life in the courts below. Sunburst Bank has not joined petitioner in its petition for a writ of certiorari to the Court of Appeal.

B. The Executive Life Guaranteed Investment Contracts

During the year 1986, seven governmental entities separately issued approximately $1.8 billion in taxable municipal bonds.[2] Respondents, together with petitioner's predecessor-in-interest and Sunburst Bank's predecessor-in-interest, served as indenture trustees with respect to separate bond issues, and, pursuant to the requirements of their trust indentures, deposited the net proceeds of the bond sales with Executive Life under the terms of various GICs. The GICs required Executive Life to make specific interest payments to the indenture trustees, which the indenture trustees could utilize to service the debt on the bonds. The indenture trustees were permitted to withdraw principal from the GICs to finance designated housing and agricultural loan programs.

Respondents remain the indenture trustees of their respective bond issues and holders of their respective GICs. Petitioner's predecessor-in-interest, First RepublicBank of Houston, N.A. ("First Republic"), however, became insolvent and was placed into FDIC receivership on July 29, 1988. Pursuant to a contract of assignment executed that same day, the FDIC transferred the GIC held by First Republic (the "First Republic GIC") to JRB Bank, N.A., a bridge bank created by the FDIC for the purpose of disposing of First Republic's assets and liabilities. Again on

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[2]The issuer, issue, and indenture trustee of these municipal bonds are identified on Appendix A: Similarly Situated Taxable Municipal Bond Issues.

the same day, petitioner's parent acquired the stock of JRB Bank, N.A., changing the bank's name first to NCNB Texas National Bank, then NationsBank of Texas, N.A., and petitioner became the successor indenture trustee for First Republic and successor holder of the First Republic GIC.

C. Executive Life's Insolvency

On April 11, 1991, more than two years *after* petitioner became the successor indenture trustee for First Republic and successor holder of the First Republic GIC, the Los Angeles County Superior Court (the "Trial Court") placed Executive Life into conservatorship and imposed a moratorium on interest payments under Executive Life GICs. Notwithstanding the FDIC's one-day ownership of the First Republic GIC at a time when the GIC was current, unmatured, and unaccelerated, petitioner moved the Trial Court to determine that petitioner, as assignee of the FDIC, was entitled to assert in the conservatorship proceeding the priority of the United States government under the federal insolvency statute.

. After a hearing on the parties' cross motions for summary judgment, the Trial Court denied petitioner's motion and granted the opposing parties' motion for summary judgment, holding that petitioner's claim against Executive Life was not and never had been the claim of the United States government. (Pet. 17a).

D. Opinion of the Court of Appeal

Affirming the Trial Court, the Court of Appeal construed the contract by which the FDIC assigned the First Republic GIC and held that the FDIC failed to assign to petitioner the priority available to the United States government under the federal insolvency statute. (Pet. 12a). The Court of Appeal assumed, merely for the purposes of argument, that *were* the FDIC -- and not petitioner -- the holder of an Executive Life GIC and thus a party in the conservatorship proceeding, it could assert a priority under the federal insolvency statute. *Id.*

Working within that framework, the Court of Appeal disposed of the case by making the correct and unremarkable holding that with respect to the First Republic GIC, the FDIC transferred to petitioner only that which First Republic owned. The Court of Appeal based its decision on a construction of a limitations clause in the assignment contract. (Pet. 13a). According to the Court of Appeal, the assignment contract's transfer of the First Republic GIC to petitioner "'to the same extent as though . . . [petitioner] had originally assumed the same'" did not carry with it any right the FDIC might have had under the federal insolvency statute. (Pet. 13a).[3]

---

[3]Apart from the construction of the assignment contract, the Court of Appeal's holding that with respect to the First Republic GIC the FDIC transferred to petitioner only that which First Republic owned is also supported by a simple logical conclusion based on the plain words of the federal insolvency statute: because the FDIC never owned the First Republic GIC during a period when the GIC was in default or Executive

REASONS FOR DENYING THE PETITION

I. Neither The Decision Below Nor The Record Raises The Question Presented In The Petition

According to NationsBank's petition, the sole Question Presented is whether the FDIC's assignment of a failed bank's assets to a bridge bank assigns statutory rights held by the FDIC as receiver.[4] (Pet. i). The body of the petition, however, reveals that the real issue in this case is the proper construction of the FDIC's *particular* contract of assignment to petitioner. Such an issue does not rise to the level of national importance warranting review by this Court.

Petitioner concedes that this case turns on the construction of a particular contract. According to petitioner, a specific clause of the assignment contract controls the resolution of this dispute, and the Court of Appeal erred in relying on another clause of the contract to decided the case. (Pet. 24-25).

Despite petitioner's attempts to transmogrify an issue of importance to it and the respondents into a question of national banking policy, the conclusion is inescapable that the Court of Appeal's construction of a single assignment contract has no importance outside the unique circumstances under which this dispute arises. Even assuming petitioner is correct in stating that the contract clause it champions is

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Life was insolvent, the federal insolvency statute never came into play, and the FDIC had no priority to assign.

[4]This formulation assumes the FDIC had the statutory right petitioner asks this Court to recognize. As demonstrated by this opposition, it did not.

"similar" to clauses found in many FDIC purchase and assumption agreements (Pet. 27), it makes no such assertion regarding the language of limitation the Court of Appeal found dispositive of this case. Accordingly, the Court of Appeal's decision stands for the simple proposition that with respect to the specific contract of assignment between petitioner and the FDIC and the unique facts of this case, petitioner did not receive from the FDIC a priority under the federal insolvency statute. This Court need not review such contract construction.

II. The Result Reached By The Court Of Appeal Creates No Conflict With Other State Courts Of Last Resort Or Federal Courts Of Appeals

The Court of Appeal's decision offers no challenge to the Court's *D'Oench, Duhme* doctrine or judicial precedent permitting assignees of the FDIC to assert the same six-year statute of limitations as the FDIC.

A. The Court Of Appeal's Decision Does Not Address The Application Of The *D'Oench, Duhme* Doctrine Or The Statute Of Limitations Precedents

For the purposes of its decision, the Court of Appeal assumed that were the FDIC a party to the Executive Life litigation, it could assert the federal insolvency statute. (Pet. 12a). Petitioner concedes this point and acknowledges that the "question [of the FDIC's authority to assert the federal insolvency statute] is not presented by [its] petition." (Pet. 6 n.2).

In light of the acknowledged framework for the Court of Appeal's decision, petitioner cannot correctly maintain

that the holding imperils *D'Oench, Duhme* or the statute of limitations cases. The Court of Appeal did not hold that the FDIC could not assert a priority under the federal insolvency statute, nor did it hold that the FDIC could not assign such a priority to a bridge bank. (Pet. 6 n.2). Rather, the Court of Appeal held that under the facts of this particular case, the FDIC did not assign to petitioner a right to assert a priority under the federal insolvency statute.

Because the Court of Appeal's decision is limited by the framework of its analysis and the underlying facts of the case, such a holding has no impact whatsoever on the FDIC or its assignee's ability to defeat a debtor's attempted reliance on a secret agreement made with a failed bank. Nor does the holding have any bearing whatsoever on the FDIC or its assignee's enjoyment of a six-year statute of limitations for contract claims. Indeed, this case has nothing to do with *D'Oench, Duhme* or the federal statute of limitations. The only issue in this case is the application of the federal insolvency statute. Petitioner has not provided this Court with a single case in conflict with the Court of Appeal's disposition of that issue.

B. The Court Of Appeal's Decision Is In Conformity With The Decisions Petitioner Claims Conflict

Each purported conflicting *D'Oench, Duhme* or statute of limitation precedent cited by petitioner is easily distinguishable from this case. In each cited case, an assignee of the FDIC or the Federal Savings and Loan Insurance Corporation ("FSLIC") was attempting to assert a right previously held by the FDIC or FSLIC. In this case, however, the FDIC never owned the statutory priority petitioner desires to assert, and thus the holdings petitioner

claims conflict with the Court of Appeal's ruling are not implicated.

Indeed, the result reached by the Court of Appeal is identical to that reached by the cases petitioner cites as conflicting. For example, in *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993), the Fifth Circuit held that assignees of the FDIC are entitled to the same six-year period of limitations as the FDIC. To reach this conclusion, the court relied on the generally applicable legal proposition that an assignee stands in the shoes of his assignor, "deriving the same but no greater rights and remedies than the assignor *then* possessed." *Bledsoe*, 989 F.2d at 810, quoting *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros. Inc.*, 452 F.2d 1346, 1357 n.69 (D.C. Cir. 1971) (emphasis added).

When petitioner received the First Republic GIC from the FDIC on July 29, 1988, it received all the rights therein the FDIC then possessed. These rights could not have included a priority under the federal insolvency statute, because the First Republic GIC was not in default and Executive Life was not insolvent.

III. Petitioner Asks This Court To Fashion Federal Common Law Creating An Entire Class Of Premium Securities, Their Value Based On The Serendipitous Failure Of Their Prior Holder

The Court of Appeal assumed for the purposes of its decision that the FDIC was the United States government. (Pet. 12a). As discussed in Section IV below, this is a clearly erroneous proposition. However, even if the holding in *Pima Fin. Serv. Corp. v. Intermountain Home Systems, Inc.*, 786 F. Supp. 1551 (D. Colo. 1992) (the FDIC is not the United States government for the purposes of the federal

insolvency statute) is overlooked and this Court's unanimous statement in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2053 (1994) ("the FDIC is not the United States"), is disregarded, and the Court assumes the FDIC is the United States for purposes of the federal insolvency statute, it would require a new rule of law, fashioned by this Court, to permit petitioner to assert a right of the FDIC that would have been available to the FDIC only upon the occurrence of events which arose *subsequent* to the FDIC's assignment of the First Republic GIC.

Petitioner argues -- and asks this Court to create law to the effect -- that the brief appearance of the FDIC in the chain of title of the First Republic GIC forever marks the GIC as "indebtedness to the United States" and rewrites its terms to provide a priority under the federal insolvency statute *to any future holder* in the event of default of the obligor. Even if this Court thought it appropriate to fashion federal common law, the ruling sought by petitioner can hardly be considered a desirable addition to United States jurisprudence.

Under the rule sought by petitioner, each share of stock held by a failed bank's trust department becomes preferred stock, each subordinated debt instrument is subordinated no longer, and every promissory note is automatically accompanied by a first mortgage on all the property of the maker. Were the Court to adopt the rule urged by petitioner, the Court would create an entire class of premium securities, their value based on the serendipitous failure of their prior holder.

Petitioner's justification for adoption of such a new rule of federal common law is to facilitate the FDIC's use of purchase and assumption agreements. According to

petitioner, allowing the Court of Appeal's decision to stand would thwart the "important federal policy goals" of establishing bridge banks and assigning to them the assets of failed financial institutions. (Pet. 27).

As discussed in Sections I and II above, the Court of Appeal's decision does not impact any federal policy and never reaches the Question Presented asserted by petitioner. However, even if petitioner's Question Presented were before this Court, the perceived effect of the Court of Appeal's decision on the FDIC would not justify the creation of a new federal rule of decision. The FDIC and the deposit insurance fund -- much less the FDIC's assignee -- do not win every legal dispute simply by pleading a perceived impact on the corporation or the fund. As this Court very recently stated with respect to a FDIC pleading which argued that a ruling might negatively impact the deposit insurance fund:

> Of course we have no authority to . . . [create a new federal rule of decision in order to avoid a negative impact on the deposit insurance fund], *because there is no federal policy that the [deposit insurance] fund should always win.*

O'Melveny & Myers, 114 S. Ct. 2048, 2055 (emphasis added).

IV. The Result Reached By The Court Of Appeal Is Correct Because The Prerequisites To Application Of The Federal Insolvency Statue Do Not Exist

The federal insolvency statute is an extraordinary statute, intended to protect the federal fisc when an insolvent debtor, indebted to the United States government, commits

an act of bankruptcy. It was never intended to afford preferential status to private creditors seeking to collect privately-funded debts.

A plain reading of the statute reveals that the United States government's priority arises only upon the *simultaneous* occurrence of the following three prerequisites: (1) a person is indebted to the United States government; (2) at the time the debtor is indebted to the United States government the debtor is insolvent; and (3) the insolvent debtor commits an act of bankruptcy. In addition, this Court has required that the funds over which the priority is asserted be funds of the United States. The absence of any one of these elements at the appropriate time defeats the claim. All four prerequisites are missing from petitioner's claim, and, thus, it must fail.

A. Executive Life Has Never Been Indebted To The United States Government With Respect To The First Republic GIC

The First Republic GIC was purchased by a private financial institution using the proceeds of a municipal bond offering. (Pet. 4a). None of the funds used to purchase the First Republic GIC were United States government funds, and none of the parties to the GIC were even remotely related to the United States government.

At no point did Executive Life, as obligor on the First Republic GIC, owe a debt to the United States government. Rather, the obligations represented by the GIC were, for less than a day, owed to the FDIC as indenture trustee. But the FDIC is not the United States government, *O'Melveny & Myers*, 114 S.Ct. at 2053, and, thus,

petitioner, as its assignee, cannot satisfy the first prerequisite to the federal insolvency statute.

Even before this Court's pronouncement in *O'Melveny & Myers*, a number of federal courts had held that the FDIC was not the United States government for purposes of the federal insolvency statute. In *Pima Fin.* the FDIC, as assignee of the assets of a failed national bank, argued that the federal insolvency statute pre-empted a Colorado statute granting the state a superior lien in a tax debtor's assets and permitted the FDIC to collect an assigned trade debt (acquired by the FDIC from the failed bank, which in turn had acquired the debt as the creditor of the tradesman). *Pima Fin.*, 786 F. Supp. at 1552-53. The court, noting the "essential character of the [FDIC] insurance funds for banks and savings and loans as independent from the federal Treasury," and analyzing Congress' failure during the recent massive restructuring of the banking industry to "grant the FDIC priority under [the federal insolvency statute], which it has done with other quasi-governmental institutions," rejected the FDIC's contention and held that the FDIC is not the United States government for the purposes of the federal insolvency statute. *Id.* at 1557, 1560.

Other federal courts have reached identical holdings. For example, In *Lapadula & Villani, Inc. v. United States*, 563 F. Supp. 782, 784 (S.D.N.Y. 1983), the court held that because the FDIC was "not an integral part of the governmental mechanism," it was not entitled to the protection of the federal insolvency statute. The court stated that the purpose of the federal insolvency statute is to protect public funds, and since the FDIC's ability to recover claims as successor in interest to failed banks did not impact the federal treasury, the purpose of the priority statute would not

be served by granting the FDIC a priority. According to the court:

> The FDIC's profits do not inure to the benefit of the United States and its losses are not borne by the United States. Thus, the public treasury will be unaffected by the FDIC's success or failure in recovering the debts owed to it as successor in interest to the claims of the [failed bank]. It follows that the FDIC is not an integral part of the governmental mechanism but is rather a separate legal entity serving essentially a proprietary rather than a sovereign function. Since the purpose of the statute would not be served by permitting the FDIC to invoke the provisions [of the federal insolvency statute], the Court concludes that the FDIC is not entitled to absolute priority.

Lapadula & Villani, Inc., 563 F. Supp. at 784. *See also, FDIC v. State of New York*, 718 F. Supp. 191, 194 (S.D.N.Y. 1989), *aff'd on other grounds*, 928 F.2d 56 (2d Cir. 1991) ("The FDIC's profits do not inure to the benefit of the United States, and its losses are not generally borne by the United States. Thus, the public treasury will be unaffected by its success or failure in recovering the debts owed to it as a successor in interest to the claims of the [failed] bank").

B. Executive Life Was Not Insolvent When The FDIC Owned The First Republic GIC

Assuming solely for the sake of argument that the FDIC is the United States government and, thus, the first prerequisite of the federal insolvency statute has been met, the second prerequisite -- a person indebted to the United

States government is insolvent -- clearly has not been met, and the statute does not come into play.

The presence of the FDIC in the chain of title of the First Republic GIC was fleeting. At no point during such ownership was Executive Life insolvent. To meet the insolvency prerequisite of the federal insolvency statute, petitioner must rely on the Trial Court's December 6, 1991, determination that Executive Life was insolvent. Even considering the earlier date of April 11, 1991, (the date the California Insurance Commissioner became conservator of Executive Life) as the date of insolvency, *such insolvency did not occur until almost three years after the FDIC had transferred the First Republic GIC to petitioner.* Thus, at the time of FDIC ownership of the GIC, there was no entity "indebted" to the government that was "insolvent," and, therefore, the federal insolvency statute does not apply.

C. Executive Life Committed No Act Of Bankruptcy When the FDIC Owned The First Republic GIC

For petitioner to exercise a priority under the federal insolvency statute, an "act of bankruptcy" must have been committed by an insolvent person who was at that time "indebted" to the United States government. 31 U.S.C. § 3713. This is the third, simultaneous prerequisite which must exist in order to create a priority.

In the case of Executive Life, no act of bankruptcy occurred until, at the earliest, April 11, 1991, when the conservator initiated the rehabilitation of Executive Life's affairs. This occurred, however, nearly three years after the FDIC had transferred the First Republic GIC to petitioner.

Accordingly, no act of bankruptcy occurred while a debt was owed to the FDIC.

D. The Funds Over Which Petitioner Attempts To Assert A Priority Are Not Funds Of The United States Treasury

The final prerequisite to application of the federal insolvency statue is that the debt owed involve funds of the United States. Petitioner clearly cannot meet this prerequisite. Were it to enjoy a priority in the Executive Life conservatorship, the funds thus collected would not benefit the United States government. Moreover, even if petitioner's assignor, the FDIC, successfully asserted a priority in this case, the increased recovery from the Executive Life estate would represent the recovery of private funds -- the proceeds of municipal bond sales -- and have no impact whatsoever on the United States government.

This Court has held on a number of occasions that unless funds of the United States treasury are involved, the federal insolvency statute does not apply. For example, in *Nathanson v. Labor Board*, 344 U.S. 25 (1952), the National Labor Relations Board claimed a priority under the federal insolvency statute's predecessor statute when pursuing back pay against an insolvent employer. This Court held that no priority existed, because the debt owed was not owed to the United States government. According to the Court:

> The priority granted by . . . [the federal insolvency] statute was designed to secure an adequate revenue to sustain the public burdens and discharge the public debts. There is no function here of assuring the public revenue. The beneficiaries of the claims are private persons. . . ."

Nathanson, 344 U.S. at 27-28 (citations omitted). *See also United States v. Moore*, 423 U.S. 77, 81-83 (discussing the history and intent of the federal insolvency statute).

Obviously absent from these proceedings is the FDIC, the United States Department of Treasury, any United States Attorney, or, indeed, any party claiming to act as or on behalf of the United States treasury. That absence is simply explained and is fatal to petitioner's argument: the funds of the United States treasury are not involved in these proceedings.

Petitioner attempts to circumvent this Court's requirement that United States funds be involved before application of the federal insolvency statute by misreading *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483 (1926) and *SBA v. McClellan*, 364 U.S. 446 (1960). In both *Bramwell* and *McClellan* private parties, as assignees, were permitted to assert the priority available to the United State government under the federal insolvency statute. However, unlike this case, both those cases involved funds of the United States government.

Bramwell involved the federal government, as *trustee* of Native American funds, making deposits into a bank which later failed. *Bramwell*, 364 U.S. at 485-86. The funds, therefore, were those of the United States, and their loss would have been the United State's treasury's loss. *Id.* at 487 ("The lower courts rightly held that the amount owed by the bank on account of the deposit in question was a *debt due to the United States*") (emphasis added). Moreover, as this Court later explained in *Nathanson v. Labor Board*, 344 U.S. 25, 28 (1952) (refusing to permit a private party to assert the priority under the federal insolvency statute), *Bramwell* "rests on the status of Indians as wards of the

United States . . . and the continuing responsibility which it has for the protection of their interests."

McClellan involved funds which originally came from the United States Treasury, and this Court based its decision on the federal source of the disputed funds. The Court found application of the priority to be appropriate because:

> [T]he money was loaned by, and the debt sought to be collected is due to, the United States . . . . The purpose of . . . [the federal insolvency statute] is simply to protect the interest of the government in collecting money due to it.

McClellan, 364 U.S. at 451-52.

In contrast, petitioner is not attempting to collect any amounts loaned by or due to the United States government -- nor was it assigned any rights or obligations of that kind. Rather, this dispute involves the recovery of private funds, and the Court of Appeal rightly held that the federal insolvency statute was not available to this private petitioner. In so holding, the Court of Appeal followed the general rule repeated by a different division of the same court: In circumstances such as these, "the cases are in accord . . . . If no treasury funds are at risk, there is no debt owing the United States" and there is no priority under the federal insolvency statute. *Federal Home Loan Mortgage Corp. v. Superior Court*, 224 Cal. App. 3d 218, 225, 273 Cal. Rptr. 531, 535 (1990).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Appendix A
Similarly Situated Taxable Municipal Bond Issues

Issue:	$300,000,000 9% Industrial Development Revenue Bonds, Series 1986A
Issuer:	Adams County, Colorado
Trustee:	First Interstate Bank of Denver, N.A.
Issue:	$200,000,000 8.88% Securitized Multifamily Housing Revenue Bonds, Series 1986A
Issuer:	El Paso Housing Finance Corporation
Trustee:	Texas Commerce Bank — El Paso, National Association
Issue:	$150,000,000 8.25% Agricultural Revenue Bonds, Series 1986A
Issuer:	Louisiana Agricultural Finance Authority
Trustee:	Sunburst Bank, successor to Capital Bank and Trust Co., trustee, and Premier Bank, N.A., successor to Louisiana National Bank of Baton Rouge, co-trustee
Issue:	$150,000,000 8.61% Securitized Multifamily Housing Revenue Bonds, Series 1986A
Issuer:	Louisiana Housing Finance Agency
Trustee:	Commercial National Bank in Shreveport
Issue:	$400,000,000 8.68% Securitized Multifamily Housing Revenue Bonds, Series 1986A
Issuer:	The Health, Educational and Housing Facility Board of the City of Memphis, Tennessee
Trustee:	First Tennessee Bank National Association

Issue:	$100,000,000 8.34% Agricultural Revenue Bonds, Series A
Issuer:	Nebraska Investment Finance Authority
Trustee:	Norwest Bank Minnesota, N.A.
Issue:	$100,000,000 9.5% Agricultural Revenue Bonds, Series B
Issuer:	Nebraska Investment Finance Authority
Trustee:	Norwest Bank Minnesota, N.A.
Issue:	$300,000,000 8.6% Securitized Multifamily Housing Revenue Bonds, Series 1986A
Issuer:	Southeast Texas Housing Finance Corporation
Trustee:	NationsBank Texas, formerly NCNB Texas National Bank, successor to InterFirst Bank Houston, N.A.

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No. 94-888

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v.

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Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, for the Second Appellate District, Division One

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The issue in this case is:

> whether the California Court of Appeal erred in its application of state contract law in a private dispute to conclude that an agreement by which the FDIC assigned one bank's trust business to another bank did not transfer any federal governmental priority.

Should certiorari be granted, Respondent would present two additional questions which were identified but not decided by the California Court of Appeal. These further questions are:

> whether the FDIC itself is entitled to federal governmental priority under 31 U.S.C. § 3713 (see Pet. App., 8a); and
>
> whether any United States government priority rights under 31 U.S.C. § 3713 may be assigned to non-governmental parties (see Pet.App., 12a, n.8).

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, John Garamendi, Insurance Commissioner of the State of California, files this brief in his capacity as Liquidator and Trustee of Executive Life Insurance Company and the trust created by Order of the Superior Court of the State of California, County of Los Angeles. Executive Life Insurance Company's only subsidiary company, other than wholly-owned subsidiaries, is Flora Real Estate Management Company, which is an asset of the Executive Life Insurance Company Trust.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

There is no jurisdiction to review the Court of Appeal's decision because it rests on adequate state grounds of substantive contract law. This Court has no jurisdiction to review a state law ruling below resting on adequate and independent state grounds. 28 U.S.C. § 1257; *Herb v. Pitcairn*, 324 U.S. 117, 125 (1954).

The decision below turned solely on state law issues of contract interpretation. The Court of Appeal based its decision on the separate and independent ground that, on the facts and equities of this case, no contractual assignment of any asserted federal priority rights had been made to Petitioner. (Pet.App., 11a-21a). No United States government entity is a party to the contract here or

a party to this case. The contract in question provided, by its terms, that state law governs its interpretation and construction when, as here, there is no controlling federal law. (Purchase and Assumption Agreement § 13.4, Pet. App., 27a). As explained further in the Reasons For Denying The Petition, Part II.A., *infra*, there is no federal issue nor a basis to create "federal common law" in this case. This Court should therefore deny the Petition for lack of jurisdiction.

ADDITIONAL PERTINENT STATUTORY PROVISIONS

California Insurance Code § 1033 governs the priority distribution of the assets of an insolvent insurance company and provides:

> (a) Claims allowed in a proceeding under this article shall be given preference in the following order:
>
> (1) Expense of Administration.
>
> (2) Unpaid charges due under the provisions of Section 736.
>
> (3) Taxes due to the State of California.
>
> (4) Claims having preference by the laws of the United States and by laws of this State.
>
> (5) All claims of the California Insurance Guarantee Association, the California Life Insurance Guarantee Association, . . . and associations or entities performing a similar function in other states, together with claims for refund of unearned premiums and all claims of policyholders of an insolvent insurer that are not covered claims. . . .
>
> (6) All other claims.

COUNTERSTATEMENT OF THE CASE

Petitioner NationsBank of Texas, N.A. ("NationsBank"), as indenture trustee for certain taxable municipal bondholders, is the current holder of a Municipal Guaranteed Investment Contract ("Muni-GIC") issued by

Executive Life Insurance Company ("ELIC"). Although Petitioner portrays itself as a guardian of the federal banking system, its assertion of governmental status seeks to use the happenstance of the failure of the prior trustee bank in order to vault to the front of the line among ELIC's 350,000 policyholders. The result, if Petitioner were successful, would be that Petitioner—and thereby the investors in one particular municipal bond offering—would be fully paid their $295 million claim before, and at the expense of all other creditors, including life insurance policyholders, state guarantee associations, pension annuitants, structured settlement annuitants, and even other Muni-GIC trustees and their bondholders. (See Pet.App., 4a, 6a-8a).

The background facts of this case are correctly stated in the decisions of the Superior Court, Los Angeles County (Pet.App., 17a-18a, 19a-21a), and the Court of Appeal (Pet.App., 4a-8a). However, because the decision below relied on the language of the purchase and assumption contract by which Petitioner acquired the trust business in question, special attention to that language is warranted. The purchase and assumption agreement did not provide an assignment of any governmental priority rights. Indeed, there is no evidence that Petitioner believed or understood that it obtained any priority greater than that held by the failed bank.[1] The language in the agreement assigned particular assets of the failed bank:

> The Assuming Bank hereby accepts from the Receiver an assignment of, and the Receiver hereby sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest of the

[1] There was no legal basis for Petitioner to expect governmental priority at the time it entered the agreement. At that time, decisional law suggested—as it still does—that the FDIC itself was not entitled to governmental priority, and thus had no rights to assign. See Reasons For Denying The Petition, Part III, *infra*, at 21-25.

> Receiver *in and to all of the following assets of the [Failed] Bank* . . . .

(Pet.App., 24a) (emphasis added).[2] The listed assets assigned included the failed bank's "trust business," which included trusteeship of this Muni-GIC. (Pet.App., 24a-25a). More specifically, Petitioner's contract contained a section entitled "Agreement with Respect to Trust Business" that provided that "[t]he trust business of the bank is hereby transferred to the Assuming Bank effective as of [the] Closing" (Pet.App., 26a), and which further stated that,

> Assuming Bank shall . . . succeed to the rights, obligations, properties, assets, investments, deposits, agreements and trusts of the [Failed] Bank . . ., *all to the same extent as though the Assuming Bank had originally assumed the same* . . . .

(Pet.App., 26a-27a) (emphasis added).

Analyzing these contractual provisions under California law, the Court of Appeal concluded that no assignment of priority rights had occurred. It held that "it is essential to the assignment of a right that the assignor manifest an intention to transfer the right." (Pet.App., 13a). In this case, however:

> the opposite intent is manifested by the provision that the assignment of the failed bank's trust assets was made 'to the same extent as though' [Petitioner] 'had originally assumed' those assets from the failed banks, without any involvement by the FDIC. (Rest.2d Contracts, § 203, subd. (c) ['specific terms and exact terms are given greater weight than general language']; *Furtado v. Metropolitan Life Ins. Co.* (1976) 60 Cal.App.3d 17, 25.)

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[2] The agreement also acknowledged that Petitioner was "acquir-[ing] certain assets of, and assum[ing] the deposit and certain liabilities of, the Failed Bank," *not* the FDIC. (Pet.App., 23a).

Id. "Since the parties have demonstrated their ability to draft an assignment with specificity, and since the equities of this case do not favor a finding of implied assignment," the Court of Appeal declined Petitioner's invitation to imply an assignment of priority rights. (Pet.App., 14a).

On the face of the agreement, there is no basis to conclude that Petitioner was ever intended to assume a priority superior to competing creditors. Petitioner was simply to succeed to the same rights as if it had been the original trustee of the Muni-GIC. The Court of Appeal ultimately held that "the fleeting presence of the FDIC in the chain of possession of the Muni-GICs now owned by NationsBank . . . did not transmogrify the Bank['s] claims into claims of the United States government." (Pet.App. 14a). It is only the historical accident of the original trustee's failure that now allows Petitioner to attempt the "alchemy" of converting a private claim into a governmental one.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THIS CASE AND DECISIONS INVOLVING IMPLIED ASSIGNMENT OF STATUTORY RIGHTS THAT CONGRESS SPECIFICALLY GRANTED UNDER FIRREA

Contrary to Petitioner's view, there is no conflict between the Court of Appeal's decision and the decisions of other federal and state courts. Seizing on a sentence in the Court of Appeal's opinion (while ignoring the Court of Appeal's overall rationale), Petitioner seeks to manufacture a conflict by reference to case law specifically distinguished in the decision below. Petitioner tries to argue that cases finding implied assignment of rights created by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 somehow conflict with the decision below. (Pet., 9-10). In fact, the Court of Appeal's holding does nothing of the sort. It ruled merely that there was no assignment of federal priority rights by 'im-

plication" where the express terms of the contract, public policy and the equities all indicated otherwise. It held nothing more, and held nothing that would cause the consequences that Petitioner fantasizes.

The Court of Appeal's analysis began by reviewing the specific language in the purchase and assumption agreement. It quoted the agreement's provisions of assignment transferring "to the Assuming Bank, all right, title and interest of the Receiver *in and to all of the following assets of the* [*Failed*] *Bank*," and providing that the "Trust Business" was "succeed[ed] . . . *all to the same extent as though the Assuming Bank had originally assumed same* . . . ." (Pet.App., 13a). In this context—reviewing the express words of the agreement—the Court explained that "[i]n neither agreement is there an assignment of *anything* belonging to the FDIC." (Pet.App., 13a). The Court of Appeal then determined that,

> Nothing in the purchase and assumption agreement[] establishes or even suggests an intent by the FDIC to assign to the Bank[] a right belonging to the FDIC qua FDIC. Quite the opposite intent is manifested by the provision that the assignment of the failed bank's trust assets was made 'to the same extent as though' NationsBank . . . 'had originally assumed' those assets from the failed bank[], without any involvement by the FDIC.

(Pet.App., 13a). In short, the Court of Appeal specifically referred to the language governing the trust assets and the express terms of the purchase and assumption agreement, and held that, on this contract and on these equities, any assignment of any FDIC priority rights must be express and would not be implied. The Court of Appeal did *not* rule on the assignment of the statutorily-conferred secret agreement[3] or statute of limitations[4]

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[3] 12 U.S.C. § 1823(e); *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447 (1942).

[4] 12 U.S.C. § 1821(d)(14); 28 U.S.C. § 2415(a).

provisions of FIRREA.[5]

The Court of Appeal distinguished the "secret agreement" cases that originated in *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447 (1942). It specifically considered Petitioner's main case supporting its *D'Oench, Duhme* theory, *Bell & Murphy & Assoc. v. InterFirst Bank Gateway*, 894 F.2d 750, 754 (5th Cir. 1990), and noted that the *D'Oench, Duhme* rule, codified by FIRREA as 12 U.S.C. § 1823(e), may bar claims and defenses against the FDIC based on secret or unrecorded agreements if such agreements would defeat or diminish the FDIC's rights in the acquired asset. The Court below, however, differentiated between this doctrine and federal priority:

> The *D'Oench, Duhme* doctrine . . . may sometimes be extended to benefit the FDIC's assignees (*Cadle Co. II, Inc. v. Lewis*, (Kan. 1993) 864 P.2d 718, 720-721). But the doctrine has never been applied

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[5] Petitioner spends a good deal of time quibbling with the Court of Appeal's construction of the various provisions of their contract. (Pet., 22). These arguments—fact specific as they are—present no basis for certiorari. In any event, Petitioner's arguments are incorrect. Indeed, the FIRREA statute itself tracks the interpretation of the Court of Appeal. In detailing which assets may be transferred by the FDIC as receiver to the bridge bank, the statute provides that a bridge bank may "purchase such assets (including assets associated with any trust business) *of such [failed] bank or banks* . . . as the [FDIC] may, in its discretion, determine to be appropriate." 12 U.S.C. § 1821(n)(1)(B)(ii). The statute provides no authority for the sale of any purported FDIC priority rights, and no basis to assume that any such rights which may exist have been assigned. Petitioner's citation (Pet., 23, and 24, n.8) to *NCNB Texas National Bank v. Cowden*, 895 F.2d 1488 (5th Cir. 1990) is misdirected. There is no dispute that the FDIC, as receiver, took the failed bank's assets by operation of law under FIRREA and specifically 12 U.S.C. § 1821(d)(2)(A)(i). *Cowden* simply stands for the proposition that since the Receiver took the trusts by operation of law, there is no need to have individual appointments of successor trustees on each trust. *Cowden* is in no way inconsistent with the Court of Appeal's conclusion that the agreement failed to assign any priority rights.

> in the manner suggested by NationsBank . . ., which would create an *implied assignment bestowing upon an assignee of the FDIC a governmental priority over other claimants* . . . . Since the parties have demonstrated their ability to draft an assignment with specificity, and since the equities of this case do not favor a finding of implied assignment, we decline the Bank['s] invitation to extend the *D'Oench, Duhme* doctrine.

(Pet.App., 14a) (emphasis added). The Court below did not opine that *D'Oench, Duhme* rights were unassignable, or that such rights were not assigned here. It addressed just the priority issue, and held simply that given the language of the purchase and assumption agreement and the inequity of clothing the bank's claims with "the aura of a governmental entity" merely because of the FDIC's "ephemeral involvement" with the bank (Pet. App., 4a), no *priority* rights would be deemed assigned by implication.

The Court of Appeal also distinguished the cases that had held the FDIC's extended statute of limitations assignable, explaining that the justification for finding assignment of the statute of limitations did not apply here:

> The availability of a longer period of limitations in an action between an assignee of an insolvent bank and a debtor of the same bank does no more than extend the period during which those parties can litigate their rights vis-á-vis each other. There are miles to go before reaching the Bank['s] conclusion, which would permit the assignee of a failed bank to claim priority in an action involving parties who had no relationship at all with the failed bank and who, by pure chance, are attempting to collect from the same third party debtor as the Bank[]. (See also *S.E.C. v. Albert & Maguire Sec. Co., Inc.*, 560 F.2d 569, 573 (3d Cir. 1977) [bank receiving assignment of customer's priority claim in Securities Investor Protection Act liquidation could not assume

> preferred status because it would result in an "inequitable distribution" of the estate].)

(Pet.App., 12a, n.8). The Court below had no cause to decide whether the statute of limitations had been assigned by NationsBank. It decided merely that any right to priority would not be deemed assigned by implication, given the inequity of doing so and the policy considerations that differentiate federal priority issues from those relating to the statute of limitations.[6]

The Court of Appeal's decision is solidly supported by this Court's recent decision in *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. ——, 114 S. Ct. 2048 (June 13, 1994)[7] and other federal decisions refusing to imply rights not expressly granted under FIRREA's statutory scheme. Through the comprehensive FIRREA statute, Congress expressly supplied the FDIC with certain "special" rights, including an extended statute of limitations (12 U.S.C. § 1821(d)(14)) and protection against unwritten or secret agreements that could diminish the FDIC's recovery (12 U.S.C. § 1823(e)). See *O'Melveny*, 114 S. Ct. 2054. Congress deemed each of these rights of sufficient import to warrant augmented power for the FDIC. Some cases, referred to by Petitioner, have found that the same policy rationale motivating Congress to supply the FDIC with such powers sufficiently supports

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[6] Similarly, Petitioner's invocation of *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244 (Colo. 1994) (Pet. 14, 20-21) and *Fall v. Keasler*, 1991 WL 340182 (N.D. Cal. 1991) (Pet. 16, 20), is to no avail. The fact that these courts found that assignees of the FDIC as receiver were entitled to assert the statutorily-extended federal agency statute of limitations does not establish that the language of the purchase and assumption agreements assigns the federal priority to Petitioner. Further, *Fall v. Keasler* is an unpublished United States District Court opinion, without precedential value.

[7] See the more detailed discussion of *O'Melveny in* Part II.A., *infra*, at 12-14.

the FDIC's assignment of such powers. The Petition wrongly contends that there is an inconsistency between those FIRREA-based cases and the Court of Apeal's "refusal to extend" these doctrines to find an "implied assignment" of priority rights *not* created or authorized by FIRREA. (See, *e.g.*, Pet., 17).

Congress was aware of the issue of whether or not the FDIC is entitled to governmental priority at the time it enacted FIRREA. See *PIMA Financial Service Corp. v. Intermountain Home Systems, Inc.*, 786 F. Supp. 1551, 1560 (D. Colo. 1992). But rather than extend the governmental priority statute to the FDIC—as it extended the *D'Oench, Duhme* doctrine by enactment of 12 U.S.C. § 1823(e)—Congress has repeatedly declined to afford the FDIC full-fledged government status and priority rights. Congress has never enacted any statute affording the FDIC the right to governmental priority. As *O'Melveny* and *Pima* make clear, Congress' decision not to afford the FDIC express priority powers demarks the limits for the implication of special powers.[8] In *O'Melveny's* words, *"inclusio unius, exclusio alterius."* 114

[8] The federal courts have also recognized the tension between claims of the *FDIC* in insolvency proceedings and the claims of other creditors, and have therefore "limited the applicability of *D'Oench, Duhme* in bankruptcy proceedings." *Texas Trust Savings v. Nasr (In re Nasr)*, 120 B.R. 855, 859 (Bankr. S.D. Tex. 1990) (despite *D'Oench, Duhme* and federal holder in due course doctrines, debtor could assert bank official's alleged fraud in defense to a FSLIC assignee's action to determine dischargability); see also *In re Still*, 963 F.2d 75 (5th Cir. 1992) (rejecting FDIC's claim that its vital role in banking system necessitated "special protections," and holding that where FDIC opposed other unsecured creditors in action to recover preferential transfer, "the FDIC deserves no greater priority than these other creditors," and that "there is no indication . . . that Congress intended the FDIC to receive a similar priority here"); *In re Pernie Bailey Drilling Co.*, 111 B.R. 565, 576 (Bankr. W.D. La. 1990) (the FDIC as receiver is not automatically a good faith transferee for value under Section 550(b)).

S. Ct. at 2054. FIRREA "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." *Id.*; *PIMA*, 786 F. Supp. at 1560. Indeed, no published decision has ever held that the FDIC may assign a right of governmental priority. The Court of Appeal's distinction between implied assignment of priority rights and implied assignment of FIRREA power tracks the distinction drawn in *O'Melveny*. The Court of Appeal properly declined to find an implied assignment of priority rights here.[9]

II. NOTHING IN THIS CASE WARRANTS DISPLACEMENT OF THE STATE LAW RULE OF DECISION BY THE CREATION OF FEDERAL COMMON LAW

Even assuming that there was some conflict between the decision below and those in other jurisdictions, which there is not, that assumption would not justify certiorari. A conflict between state laws—even a divergence from the majority of jurisdictions—provides no basis for displacing a state's rule with a federal one. See *O'Melveny*, 114 S. Ct. at 2053 (refusing to create federal common law

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[9] Petitioner's assertion that there is a uniform body of precedent supporting its claim on assignability of priority rights is merely an attempt to stitch together various holdings and rationales of different opinions to create a rule of law which does not exist. Notwithstanding Petitioner's claims, the collection of cases it relies upon are distinguishable because they do not address federal priority rights or any rights other than those expressly provided for in FIRREA. They merely hold that certain protections expressly granted the FDIC may be enforced.

Finally, Petitioner's assertion that "the right to assert the FDIC's priority in a liquidation is markedly less intrusive" (Pet., 17) than *D'Oench Duhme* and statute of limitations rights is wrong. Placing Petitioner ahead of all other policyholders would directly impact the ELIC Plan of Rehabilitation and interfere with substantial state interests in regulating insurance insolvencies by elevating its priority over and above identical competing claims. See *infra*, at 18-19.

despite state law's divergence from "the vast bulk of decisions from 43 jurisdictions"). State law, not federal common law, would still control.

A. Federal Law Does Not Apply Because This Private Dispute Between Non-Federal Parties Does Not Directly Affect The Interests Of The United States Government

Cases warranting the creation of special federal law are " 'few and restricted,' " limited to areas where there is a " 'significant conflict between some federal policy or interest and the use of state law.' " *O'Melveny*, 114 S. Ct. at 2055 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963); *Wallis v. Pan American Petroleum Corp.*, 348 U.S. 63, 68 (1966)). No such conflict exists here.

In *O'Melveny*, the FDIC sued a law firm for professional negligence related to the failure of a savings and loan called ADSB. The firm defended on the ground that, under California law, the knowledge of ADSB's officers must be imputed to ADSB, and hence to the FDIC acting as receiver, and that such knowledge barred the FDIC's professional negligence claim. The FDIC contended that federal law preempted application of the imputation defense to the receiver, arguing that federal law governs questions involving rights of the United States arising under nationwide programs. This Court held,

> What is fatal to respondent's position in the present case is that it has identified no significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might

> facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules.

Id. Having rejected the same "uniformity" argument suggested by Petitioner here (see, *e.g.*, Pet., 16, 17), *O'Melveny* further rejects Petitioner's argument that, absent application of a federal rule, public funds available to rescue insolvent banks will be "depleted." (See, *e.g.*, Pet., 27-28).

> [N]either FIRREA nor the prior law sets forth any anticipated level for the [deposit insurance] fund, so what respondent must mean by 'depletion' is simply the forgoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, 'federal-common-law' causes of action to enrich the fund. Of course we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected 'more money' arguments remarkably similar to the one made here.

Id. (citations omitted). Thus, *O'Melveny* has already rejected the "uniformity" and "more money" arguments advanced by the Petitioner for creation of federal common law respecting FDIC activities as receiver.

In any event, the Petition's footnote purporting to explain why federal law should apply relies on cases in circumstances where federal law was applied to contracts of the United States, in litigation to which the United States was a party. (Pet., 22, n.7). Those cases are inapplicable here, in the first instance, because the purchase and assumption agreement was not entered into by the United States. As *O'Melveny* stated, "the FDIC is

not the United States, and even if it were, we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of [the failed bank]." *Id.* at 2053. *A fortiori,* the bridge bank created by the FDIC to transfer assets to Petitioner was not the United States. Unless this Court is prepared, six months after *O'Melveny,* to reverse field and hold the purchase and assumption agreement to be a contract entered by the United States, there is no contract of the United States to which rules of federal construction could even possibly be applied.[10]

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[10] The authorities relied upon by the Petition are easily distinguishable because the United States was a party to those contracts and because the United States was a party to the lawsuits interpreting them. *United States v. Seckinger,* 397 U.S. 203 (1970) (suit by United States requiring interpretation of indemnification term of standard form government procurement contract promulgated by regulation issued by General Services Administration); *United States v. County of Allegheny,* 322 U.S. 174 (1944) (action involving state taxation of machinery installed in contractor's mill pursuant to contractual requirements of United States for production of ordinance); *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943) (action involving forged endorsement on United States Treasury check; disbursement of United States funds and payment of debts governed by federal law); *United States v. Tharp,* 973 F.2d 619 (8th Cir. 1992) (interpretation of guarantee agreement between borrower's principals and SBA governed by federal law); *Grosinsky v. United States,* 947 F.2d 417 (9th Cir. 1991) (action against United States under Federal Tort Claims Act for negligence and tortious breach of contract arising out of failure of vasectomy); *United States v. Triple A Machine Shop, Inc.,* 857 F.2d 579 (9th Cir. 1988) (ejectment action against lessee of government property; federal law governs interpretation of government lease contract). Further, *Dababneh* and *Downriver* are inapplicable because those two cases merely applied federal law to the distribution of assets of insolvent federal banks under federal insolvency law, and did not construe the rights of the insolvent bank itself against a third party. *Dababneh v. FDIC,* 971 F.2d 428 (10th Cir. 1992) (suit by landlord with rejected lease alleging nonratable distribution in violation of National Bank Act; federal law governs amount of proof necessary to establish validity of claims against bank's receiver); *Downriver Com. Fed. Credit U.*

Even if this case did involve a contractual obligation of the United States, which it does not, that fact would not require creation of federal law. State law governs where litigation involving federal contracts "is purely between private parties and does not touch the rights and duties of the United States." *Bank of America v. Parnell,* 352 U.S. 29, 33 (1956). Where a case involving non-federal litigants "will have no direct effect upon the United States or its Treasury," there is no cause for application of federal law. *Miree v. Dekalb County, Ga.,* 433 U.S. 25, 29 (1977). And, although any federal transaction necessarily "radiates interests in transactions between private parties," the possibility that some private dispute may have indirect ramifications on the federal government is insufficient to support displacement of state law. *Parnell,* 352 U.S. at 33-34.

In *Miree,* for example, victims of an airplane accident sued a Georgia county airport. They claimed that federal common law governed their status as third party beneficiaries under a federal contract by which the county agreed with the FAA to maintain in non-hazardous conditions the areas surrounding the airport. 433 U.S. at 28, 30. Despite the presence of a government contract, this Court declined to apply federal law, expressly distinguishing the *Seckinger* and *Clearfield Trust* line of cases. "Since only the rights of private litigants are at issue here, we find the *Clearfield Trust* rule inapplicable." 433 U.S. at 30. The *Miree* court held insufficient plaintiffs' assertion of a federal interest in uniformity and certainty of interpretation of FAA contracts. *Id.* "Nor is the fact that the United States has a substantial interest in regulating aircraft travel and promoting air travel safety sufficient, given the narrow question before us, to

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v. Penn Square Bank, 879 F.2d 754 (10th Cir. 1989) (action by depositors fraudulently induced to deposit funds in insolvent bank seeking recovery of total versus pro rata share of assets; federal law governs distribution of failed bank's assets).

call into play the rule of *Clearfield Trust.*" *Id.* at 31. As in *Miree,* only the rights of private parties are at issue here. The fact that the United States may have an interest in bank regulation does not support creation of a federal common law, given the narrow question here of implied assignment of priority rights in a state-regulated insurance insolvency.

In *Bank of America v. Parnell, supra,* the Court held an endorser's good faith in cashing stolen federal bonds was a question of state law where litigated between private parties. It found insufficient the contention that "floating of securities by the United States might somehow or otherwise be adversely affected by the local rules of a particular state regarding the liability of a converter." 352 U.S. at 33. "This is far too speculative, far too remote a possibility to justify the application of federal law" to such transactions. *Id.* at 33-34.

Similarly, in this case, the asserted risk to the federal fisc is remote and speculative at most. As to past sales of bank assets, the amount the FDIC will receive has already been determined and will remain unaffected by this case. As to sales of assets in the future, it is exceedingly improbable that the purchase price would turn on whether federal priority rights are deemed assigned by implication.[11] As explained in Part III, *infra,* the law is that the FDIC is not entitled to priority in its own right. In determining what purchase price to offer, a purchasing party could not depend on an implied assignment of priority rights that are dubious at best. But even if the purchaser would pay more for an assignment of whatever rights the FDIC might have, delivery of any such rights could be easily accomplished simply by including an express and unambiguous assignment of specific FDIC

[11] Certainly the Petition does not provide any factual support for its assertion that the prices paid for failed bank assets will be affected in any manner by this decision.

rights. There is no need for the Court to create federal common law to protect the public fisc.

This very conclusion was reached in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). There, assignees of federal oil leases sought to impose federal common law to interpret their lease assignments and thereby displace a Louisiana state law that assignment of such leases must be in writing. This Court reversed the Fifth Circuit's conclusion that the Louisiana law thwarted the policy of 30 U.S.C. § 187(a), which provided that oil and gas leases shall be assignable. See 384 U.S. at 69. The "guiding principle is that a significant conflict between some federal policy or interest and the use of state law must be shown." *Id.* "[H]owever fitting [imposition of federal common law] may be where a State interposes unreasonable conditions on assignability, it can have no force in this instance because Louisiana concededly provides a quite feasible route for transferring any mineral lease or contracting to do so, namely, by written agreement." *Id.* at 69-70. The same rationale supports application of state law here. State law merely requires that any assignment of governmental priority rights be express rather than implied—a requirement that does not conflict with any federal policy. Any party wishing to transfer priority rights may quite feasibly do so by a contract expressly saying so.[12]

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[12] In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988), the Court used federal common law to immunize government defense contractors from liability to private parties where the state-imposed duty of care was "precisely contrary to the duty imposed by the government contract." 487 U.S. 509. *Boyle* relied on the fact that the United States would be "directly affected" because, due to the nature of the defense industry, "the financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself." *Id.* at 507, 511-12. *Boyle* thus differs from this case due to (1) the direct (and unavoidable) conflict between federal contracts and state tort law, and (2) the direct effect upon the federal fisc.

Moreover, because the regulation of insurance insolvencies is entrusted to the states through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, the states have a strong interest in application of state law to priority determinations. Under the McCarran-Ferguson Act, the business of insurance is subject to the laws of the states, which hold the authority to operate state systems for the regulation, taxation, and insolvencies involving the business of insurance. 15 U.S.C. § 1012.[12] The states have the exclusive right and duty to rehabilitate or liquidate insurance companies and have enacted comprehensive regulatory schemes which include provisions for insolvency. See, *e.g.*, California Insurance Code §§ 1010-1063. As one federal court has expressed:

> Since these schemes are designed to protect the interests of policyholders and to provide for the adjustment of the rights of creditors and policyholders in the event of insolvency, Congress in enacting [McCarran-Ferguson] decided that liquidation of insurance companies should be left to the states . . . . By preserving state liquidation proceedings, Congress sought to prevent bankruptcy or reorganization courts from interfering with comprehensive state insurance regulations and with the rights of insureds protected by such regulations.

In re Equity Funding Corp. of America, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975); see also *Baldwin-United Corp. v. Garner*, 678 S.W. 2d 754 (Ark. 1984), *cert. den.*, 471 U.S. 1111 (1985).

This Court recently affirmed the recognition of states' interests in priority issues in insurance insolvencies in *U.S. Department of Treasury v. Fabe*, 508 U.S. ——, 113 S. Ct. 2202 (1993). *Fabe* held that the general federal priority statute 31 U.S.C. § 3713 did not preempt

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[13] See also, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1946); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *Allstate Ins. Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966), *cert. denied*, 385 U.S. 930 (1966).

a state satute governing priorities for policyholders in insurance insolvencies, because the state priority statute entails the "business of insurance" within the meaning of the McCarran-Ferguson Act. In *Fabe*, the conflict between the federal priority statute and the state priority statute was resolved in favor of the state statute: the priority of policyholders superior to the federal government was maintained.

The State of California has a vital interest in resolving the ELIC insolvency and rehabilitation, and in protecting the thousands of policyholders concerned in this matter. These interests fairly support the Court of Appeal's decision not to imply assignment of priority rights in a manner that would inequitably give one policyholder a windfall at all others' expense.

In short, none of the policy arguments advanced by the Petition warrants creation of federal common law here. This is a dispute between private parties that will not directly affect or conflict with the interests of the United States. State law applies.

B. FIRREA Does Not Authorize A Federal Common Law Rule

O'Melveny specifically disposes of any claim that the policies behind FIRREA serve as a source of federal common law. (See, *e.g.*, Pet., 27). *O'Melveny* rejected a contention, akin to Petitioner's here, that FIRREA "not only did not prevent but positively authorized federal common law." 114 S. Ct. at 2054. The Court refused to "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably subject to the disposition provided by state law.'" *Id.* The Court stated:

> Respondent argues that [FIRREA] should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by

> federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the court's authority to promulgate such common law. This argument is demolished by those provisions of FIRREA that specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. . . . *Inclusio unius, exclusio alterius.* It is hard to avoid the conclusion that [FIRREA] places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional 'federal common law' exceptions is not to 'supplement' this scheme, but to alter it.

Id. (citations omitted).

After *O'Melveny*, there is no room left for Petitioner's contention that FIRREA's scheme for disposition of failed banks' assets is subject to "supplementation" through a federal common law of implied assignment of priority rights. (See, *e.g.*, Pet., 26).[14] Petitioner's reliance on

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[14] Recent federal court decisions follow *O'Melveny* and fully support the proposition that there is no conflict with federal policy in this case which would justify the creation of federal common law. *Calhoun v. Yamaha Motor Corp.*, —— F.3d ——, 1994 WL 595577 (3rd Cir. 1994); *Resolution Trust Corp. v. Everhart*, 37 F.3d 151 (4th Cir. 1994) (applying state statute of limitations and not federal common law to claims by RTC against former directors and officers of failed federally chartered and federally insured thrift institution); *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206 (3rd Cir. 1994) (applying state law and not a federal rule of decision in interpreting and construing a contract's indemnification provisions that affect liability imposed under federal statutes); *F.D.I.C. v. Oldenburg*, 34 F.3d 1529 (10th Cir. 1994); *Resolution Trust Corp. v. Forest Grove, Inc.*, 33 F.3d 284 (3rd Cir. 1994); *Resolution Trust Corp. v. Maplewood Ins.*, 31 F.3d 1276 (4th Cir. 1994) (applying a state rule of decision as opposed to the creation of a federal rule of decision in a claim involving holder in due course by RTC on a note of a failed bank); *Resolution Trust Corp.*

pre-*O'Melveny* cases that referred to a federal common law respecting FIRREA-created rights is misplaced. (See Pet., 13-16). Whatever the continuing vitality of those cases might be after *O'Melveny*, it is certainly now settled that FIRREA does not spread a blanket of federal common law covering assignment of priority rights that Congress declined to grant the FDIC in the FIRREA statutes.[15]

In sum, Petitioner fails to provide any reason why this case is one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted.

III. CERTIORARI SHOULD BE FURTHER DENIED BECAUSE THE FDIC, ACTING AS RECEIVER, IS NOT ITSELF ENTITLED TO HOLD OR ASSIGN THE PRIORITY STATUS OF THE UNITED STATES GOVERNMENT

The Petition should be denied for the independent reason that granting certiorari would be a futile and purposeless act. Addressing the narrow question of whether or not priority rights must be deemed assigned by implication will not end this case. Even if that question were somehow resolved in Petitioner's favor, Petitioner would still not obtain governmental priority because the FDIC, acting as receiver, never had governmental priority rights to assign.

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v. Baker, Civ. No. 93-0093, 1994 WL 637359 (E.D. Pa. Nov. 14, 1994).

[15] The FIRREA statute itself suggests no basis for an implication of assignment of rights belonging to the FDIC. In detailing which assets may be transferred by the FDIC as receiver to the bridge bank, the statute provides that a bridge bank may "purchase such assets (including assets associated with any trust business) *of such [failed] bank or banks* . . . as the [FDIC] may, in its discretion, determine to be appropriate." 12 U.S.C. § 1821(n)(1)(B)(ii) (emphasis added). The statute provides no authority for the sale of any purported FDIC priority rights, and no basis to assume that any such rights which may exist have been assigned.

A. The FDIC Does Not Receive Governmental Priority Powers When Acting As Receiver Under FIRREA

The Court of Appeal stated its inclination to rule that the FDIC was not entitled to governmental priority, but nonetheless decided not to address that issue. (Pet.App., 11a). The correctness of the Court's "inclination" has been affirmed by this Court's *O'Melveny* decision. As noted above, *O'Melveny* stated that "the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its own rights rather than, as receiver, the rights of ADSB." *O'Melveny*, 114 S. Ct. at 2053. On the question of the status of the FDIC while acting as receiver, this Court has answered that "the FDIC as receiver 'steps into the shoes' of the failed S&L . . . obtaining the rights of the insured depository institution that existed prior to receivership.'" *Id.* at 2054.[16] Finally, as noted above, *O'Melveny* explained that the FDIC possesses no special federal rights as receiver beyond those expressly provided under FIRREA. *Id.* at 2055. Since FIRREA had enumerated certain special rights for the FDIC as receiver, the failure to include priority rights forecloses their application.

For these reasons, the FDIC had no priority rights to assign to Petitioner. The majority and better reasoned of the pre-*O'Melveny* cases so held.[17] *O'Melveny* eliminates

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[16] See also, *F.D.I.C. v. Wheat*, 970 F.2d 124, 130 (5th Cir. 1992); *Trigo v. F.D.I.C.*, 847 F.2d 1499, 1502 (11th Cir. 1988); *Royal Bank Export Finance Co. v. Bestways Dist. Co.*, 280 Cal. Rptr. 355 (1991); *F.D.I.C. v. State of New York*, 718 F. Supp. 191 (S.D.N.Y. 1989), *aff'd*, 928 F.2d 56 (2d Cir. 1991).

[17] Prior to the *O'Melveny* decision, only a few courts had considered the issue of the entitlement of the FDIC to claim priority under 31 U.S.C. § 3713. Only one of those cases, *In re Big D' iscount Stores, Ltd.*, 2 B.C.D. 1073 (Bankr. D.S.C. 1976), held that the FDIC could assert the federal priority. However, that case failed to consider the issue of federal funding of the FDIC, an essential factor in analyzing whether it is entitled to federal priority. Moreover, this case has never been followed by any other court. *Lapadula & Villani, Inc. v. United States*, 563 F. Supp. 782 (S.D.N.Y. 1983)

any remaining uncertainty as to the FDIC's lack of governmental status when acting in the role of receiver of a failed institution.

B. The Government's Priority Rights Are Not Assignable In Any Event

Taking this to the next level, which is necessary because Petitioner is an assignee, under the case law, Petitioner is not entitled to priority by assignment. Petitioner's claim of assigned priority actually conflicts with ap-

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was described as the "leading case on the issue" by the court in *PIMA Financial Service Corp. v. Intermountain Home Systems, Inc.*, 786 F. Supp. 1551 (D. Colo. 1992). The *Lapadula* Court denied extension of the federal priority to the FDIC, finding that public funds were unaffected by its ability to recover debts owed to it as successor to claims of an insolvent bank, stating that "the FDIC is not an integral part of the governmental mechanism but is rather a separate legal entity serving essentially a proprietary rather than a sovereign function." 563 F. Supp. at 784.

Prior to *O'Melveny*, the leading case on this subject was *PIMA*, which contains a comprehensive analysis of the entitlement of the FDIC to the federal priority. The *PIMA* court noted that the FDIC's banking-related activities are privately funded under FIRREA. 786 F. Supp. at 1558. Further, the Court found that (i) Congress did not give the FDIC "full-fledged agency status" in amending the FDIC's powers under the Federal Deposit Insurance Act, (ii) Congress did not grant the FDIC the federal priority, as it had done with other quasi-governmental institutions, and (iii) an analysis of the legislative history of FIRREA suggests that "the FDIC cannot take advantage of certain priorities normally afforded to the federal government." *Id.* at 1560-61. As a result, the Court found that the FDIC was not entitled to assert the federal priority of 31 U.S.C. § 3713.

Acting as receiver, the FDIC obtained only the rights of the failed bank in this case. Petitioner acknowledges the purchase and assumption agreement to which the Bank traces its purported rights is an agreement between the FDIC, as receiver of the failed bank, and the bridge bank. (Pet., 4). *O'Melveny, Lapadula,* and *PIMA* thus make it clear that the FDIC, acting as receiver of a failed bank, is not the federal government and is not entitled to any special priority rights where none were provided for it in FIRREA.

plicable case law. Courts refuse to recognize transfers of the government's priority rights by subrogation or assignment, especially when recognition of such rights would produce an inequitable result under applicable law. See *S.E.C. v. Albert & Maguire Sec. Co., Inc.*, 560 F.2d 569, 573 (3d Cir. 1977) (bank receiving assignment of a customer's priority claim in Securities Investor Protection Act liquidation could not assume preferred status because "it would result in an inequitable distribution of the bankrupt estate, inconsistent with the Congressional purpose" of that Act); *In re Int'l Eng'rs, Inc.*, 58 B.R. 1005, 1006-07 (Bankr. S.D. N.Y. 1986) (customs broker that voluntarily paid debtor's tax obligation was not entitled to governmental priority against bankrupt estate); *In re Tygrett*, 72 B.R. 129, 130-31 (Bankr. C.D. Ill. 1987) (same).

Petitioner has obviously futilely searched for legal support for the proposition that an assignee of the *United States* is entitled to statutory priority under 31 U.S.C. § 3713. It is equally obvious that there is none. For example, Petitioner claims that *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483 (1926), stands for the "broader proposition that [a private party] was entitled to assert the government priority as assignee of the government." (Pet., 20). That is not the holding of *Bramwell*. In *Bramwell*, a surety was permitted to assert the government's priority because they had paid a claim on the government's behalf. 269 U.S. at 486. The surety's priority did *not* derive from the assignment, but rather from a specific statute (R. S. § 3468), which provided:

> *Priority of Sureties.* Whenever the principal in any bond given to the United States is insolvent . . . and . . . any surety on the bond . . . pays to the United States the money due on such bond, *such surety . . . shall have the like priority for the recovery and receipt of the moneys . . . as is secured to the United States . . .*

(quoted in *Barnett v. American Surety Co. of New York*, 77 F.2d 225, 226 (10th Cir. 1935) (emphasis added)). No such statute is at issue here. In fact, this Court rejected Petitioner's precise argument in *Nathanson v. N.L.R.B.*, 344 U.S. 25 (1952) where it held that *Bramwell* would not support the collection of a priority claim by the United States for the benefit of a private party. 344 U.S. at 28.[18]

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[18] Petitioner's reliance on *Small Business Administration v. McClellan*, 364 U.S. 446 (1960) to suggest that federal policy considerations upholding a priority claim under 31 U.S.C. § 3713 is also misplaced. (Pet., 21-22). In *McClellan*, the SBA and a private bank jointly loaned a debtor $20,000, agreeing that any collections on the loan would be shared 75%/25% based upon the amount loaned by each party. *Id.* at 447. When the borrower filed for bankruptcy, the SBA asserted statutory priority for its *own* $15,000 loan; *no priority* was asserted for the $5,000 loaned by the bank. For this Court, the key issue was whether *Nathanson* suggested that the SBA "forfeited any right it might otherwise have had to priority by agreeing to turn over to the bank one fourth of any distribution obtained because of its priority." *Id.* at 451. This Court rejected this reading of *Nathanson* because "the money (*i.e.* the SBA's $15,000) was loaned by, and the debt sought to be collected is due to, the United States." *Id.* A parity of reasoning suggests that a claim of priority for the $5,000 loan by the private bank would not have survived a challenge under *Nathanson*; indeed, the court so held in *W.T. Jones & Co. v. Foodco Realty, Inc.*, 318 F.2d 881, 889 (4th Cir. 1963). Petitioner's similar claim here—that it may assert a priority against the ELIC estate on its own account, for the benefit of the bondholders—is irreconcilable with *Nathanson* and *W.T. Jones*, and should be rejected by this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONSBANK OF TEXAS, N.A.,
Petitioner,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The court below held that an express assignment by the FDIC of "all right, title and interest" of the FDIC in the assets of a failed institution did not constitute "an assignment of *anything* belonging to the FDIC," Pet. App. 13a (emphasis in original), but instead only an assignment of such rights and interests as the failed bank enjoyed before it was taken over by the FDIC. As we demonstrated in the petition (at 9-16), this holding conflicts with decisions from the Courts of Appeals for the Fifth, Eighth, and Eleventh Circuits, and from the Supreme Courts of Colorado, Kansas, Nebraska, and Texas. Those courts hold that such an assignment transfers to the assignee bank special rights belonging to the FDIC that plainly were *not* enjoyed by the failed bank—including the FDIC's right to a longer statute of limita-

tions, the FDIC's right under *D'Oench, Duhme* to defeat unrecorded agreements, and the FDIC's similar statutory right under 12 U.S.C. § 1823(e) (1988). Nothing in the responses to the petition mitigates this conflict, or diminishes the importance of the question presented.[1]

1. Respondents' primary effort to defeat certiorari consists of arguing at length over questions that they acknowledge are *not* presented by the petition. Thus, the Commercial National Bank respondents devote the major portion of their opposition ("CNB Opp.") to an argument that the FDIC is not entitled to priority under 31 U.S.C. § 3713. CNB Opp. at 10-17. They advance this argument in the face of their acknowledgment that this question is not at issue in the present petition, *id.* at 6, and despite the fact that the court below assumed for purposes of decision that the FDIC is entitled to the priority. Pet. App. 12a. Respondent Insurance Commissioner also argues at length in his opposition ("Comm'r Opp.") that the FDIC is not entitled to priority, and that government priority rights may not be assigned. Comm'r Opp. at 3 n.1, 21-25. The Commissioner implicitly acknowledges that these questions are in fact not before this Court, by asserting that if certiorari is granted, *he* will raise these additional questions, *see id.* at i, even though the court below expressly did not decide them.[2]

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[1] Petitioner's Rule 29.1 statement appears at Pet. ii.

[2] Nearly the Insurance Commissioner's entire opposition depends upon his answer to a question not presented in the petition. Thus, the Commissioner notes that FIRREA conferred certain powers on the FDIC, and he acknowledges that the cases on which we rely "have found that the same policy rationale motivating Congress to supply the FDIC with such powers sufficiently supports the FDIC's assignment of such powers." Comm'r Opp. at 9-10. He attempts to distinguish the present case, however, by asserting that "Congress has never enacted any statute affording the FDIC the right to governmental priority." *Id.* at 10. But the Court of Appeal expressly assumed that Congress did just that in 31 U.S.C. § 3713.

The short answer to respondents' extended argument over questions that are not presented is that those questions are not presented. The court below assumed that the FDIC enjoys priority under 31 U.S.C. § 3713 and that it could assign that priority, Pet. App. 12a & n.8, but held that the standard assignment language employed by the FDIC did not transfer *any* rights of the FDIC to assignee banks. *Id.* at 13a. That holding has significance far beyond the questions whether the FDIC is entitled to or may assign priority, and it is that holding that conflicts with the decisions of three federal courts of appeals and four state supreme courts. Certiorari should be granted to resolve the conflict over whether the FDIC's standard assignment language does indeed assign *its* rights to assignee banks; the question of what priority rights the FDIC does or does not enjoy should be resolved on remand in the event this Court reverses the decision below. *See* Pet. at 6 n.2.

2. In contrast to the energy they spend on questions that are not presented, the Commercial National Bank respondents devote only a few pages to defending the decision of the court below on its own terms. CNB Opp. at 6-8. They contend that the court below held only that the FDIC did not assign its priority to petitioner, and not that the FDIC *could* not do so. *Id.* at 7. What the Court of Appeal held, however, was that the FDIC did not assign its priority to petitioner because the assignment was not made expressly. Pet. App. 14a. The same is true with respect to each and every case holding that the FDIC *does* assign its greater federal powers to bridge banks through its standard purchase and assumption agreement. In none of those cases was there an express assignment of the FDIC's *D'Oench, Duhme* rights or its longer statute of limitations, yet in each instance the courts concluded that the assignment of the FDIC's right, title and interest in the underlying assets conveyed the FDIC's special federal rights with respect to those assets.

Respondents are therefore mistaken in suggesting that the decision below does not conflict with the cases cited

in the petition. If the other courts had used the reasoning of the court below that a purchase and assumption agreement transfers to the bridge bank only the rights of the failed bank, and not the rights of the FDIC, *all* of the cases cited in the petition would have been decided differently.

Respondent Insurance Commissioner contends there is no conflict because the cases on which we rely involve "implied assignment of statutory rights that Congress specifically granted under FIRREA" and "merely hold that certain protections expressly granted the FDIC may be enforced." Comm'r Opp. at 5, 11 n.9. Not so. Several of the cases involve assignment of the FDIC's special rights under the common law doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), rather than express statutory rights granted under Section 1823(e) of FIRREA.[3] The source of the particular FDIC right at issue is, in any event, beside the point. The court below held that the standard assignment by the FDIC of its interests did not effect "an assignment of *anything* belonging to the FDIC." Pet. App. 13a (emphasis in original). The suggestion that this ruling can be reconciled with precedents holding that the standard assignment does indeed transfer special rights belonging to the FDIC, depending on the particular source of the right, is wholly unavailing.

The Insurance Commissioner further argues that the decision below is correct because FIRREA "suggests no basis for an implication of assignment of rights belonging to the FDIC." Comm'r Opp. at 21 n.15, *see id.* at 7 n.5. The same argument could be made, however, with respect to the FDIC's rights under *D'Oench, Duhme*, or the FDIC's right to a longer limitations period. FIRREA

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[3] *See, e.g., Bell & Murphy & Assocs.* v. *InterFirst Bank Gateway, N.A.*, 894 F.2d 750, 753 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990); *Kilpatrick* v. *Riddle*, 907 F.2d 1523, 1526 n.4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *Porras* v. *Petroplex Savings Ass'n*, 903 F.2d 379 (5th Cir. 1990).

says nothing about the assignment of those rights either, yet the courts have uniformly held that those rights are transferred to assignee banks pursuant to the identical assignment language at issue in this case.[4] Once again, the Commissioner's arguments do nothing to mitigate the conflict documented in the petition.

In fact, rather than offer any arguable distinctions, the Commissioner instead suggests that the cases surveyed in the petition may no longer be good law after this Court's decision in *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994). Comm'r Opp. at 21. The Commissioner's effort to discredit the uniform body of recent precedent from three federal circuits and four state supreme courts is misplaced. In *O'Melveny & Myers*, the FDIC sought creation of a federal common law right, unique to it, that would allow it to preempt established state law principles and prevail on a state law tort claim. In contrast, the issue in the instant case is not the creation of a federal common law right in the FDIC, but the assignment by the FDIC of a federal *statutory* right to priority in certain insolvency proceedings. *See* 31 U.S.C. § 3713. Here there is no question of a right unique to the FDIC in derogation of state law, but instead simply the application of the established rule—consistent with state law—that a "voluntary assignee is ordinarily invested with all the rights his assignor possessed." *Hoffeld* v. *United States*, 186 U.S. 273, 276 (1902). *O'Melveny & Myers* had nothing whatever to do with the question of whether federal statutory rights enjoyed by the FDIC are assigned along with the assets to which those rights attach. But

[4] As the Texas Supreme Court recently noted in rejecting a similar argument, "one could just as easily argue that 'Congress knew of the extensive body of case law extending the FDIC's benefits (like federal holder in due course, *D'Oench, Duhme* and Section 1823(e)), and therefore thought it unnecessary to restate the federal common law.'" *Jackson* v. *Thweatt*, 883 S.W.2d 171, 175 (Tex.) (quoting Brian J. Woram, *FIRREA's Statutes of Limitations: Their Availability to Purchasers From the FDIC*, 110 Banking L.J. 292, 304 (1993)), *cert. denied*, 115 S. Ct. 196 (1994).

if indeed the Commissioner is right that *O'Melveny & Myers* calls into question the established body of precedent relied upon in the petition, that in itself is a compelling reason to grant certiorari.

3. Both the Commercial National Bank respondents and the Insurance Commissioner seek to limit the significance of the decision below by arguing that the Court of Appeal was simply construing the language of a particular agreement. CNB Opp. at 5; Comm'r Opp. at 5-6. The language at issue in this case, however, is the standard assignment language used by the FDIC in its bridge bank and other purchase and assumption transactions. *See, e.g., NCNB Texas Nat'l Bank* v. *Cowden*, 895 F.2d 1488 (5th Cir. 1990) (identical language); *Kilpatrick* v. *Riddle*, 907 F.2d 1523 (5th Cir. 1990) (same), *cert. denied*, 498 U.S. 1083 (1991); *Successor Trust Committee* v. *First State Bank*, 735 F. Supp. 708, 711 (W.D. Tex. 1990) (same); Pet. App. 12a ("identical language" in Capital Bank & Trust Co. purchase and assumption agreement). There were more than 500 such transactions from 1989-1993 alone. *See* Pet. at 28 & n.9. Viewing the decision below as a construction of the purchase and assumption agreement confirms rather than undermines the broader significance of the ruling below that the language of that standard agreement does not effect "an assignment of *anything* belonging to the FDIC." Pet. App. 13a (emphasis in original).

We reiterated in the petition that the language of the purchase and assumption agreement at issue in this case was indistinguishable from the language in the agreements at issue in the conflicting cases. *See* Pet. at 10, 13, 16, 22. One would have expected respondents' contention—that the decision below turned on a construction of the language of the agreement—to be accompanied by an explanation of how that language differed from that of the agreements in the other cases. But no such explanation appears in the oppositions. The reason is that there are no pertinent differences.

In any event, as the other courts that have considered the question have concluded, the question whether the FDIC transfers *its* rights to assignee banks turns not simply on the language of the purchase and assumption agreement, but also on federal banking statutes, the policies underlying those statutes, and federal common law. Courts construing language in purchase and assumption agreements indistinguishable from the language at issue here have looked to these other considerations in deciding—contrary to the holding below—that the FDIC transfers special rights it enjoys, and not merely the rights of the failed institution, to its assignees. *See* Pet. at 18-21, 25-28.

4. Respondents argue that it would be inequitable to accord petitioner's claims priority in the Executive Life liquidation proceeding, *see* CNB Opp. at 9; Comm'r Opp. at 3, but again that argument does not go to the question presented. The Court of Appeal assumed that the federal government priority in 31 U.S.C. § 3713 could be asserted by the FDIC, Pet. App. 12a, and California law itself accords priority to "[c]laims having preference by the laws of the United States." Cal. Ins. Code § 1033 (a)(4). The question is not whether granting such priority is a good idea, but whether the FDIC assigns that priority when it assigns "all right, title and interest" that it enjoys to a transferee bank. To the extent such an assignment results in priority for claims inherited by the assignee bank, this is "a result, not of any inequality of distribution on the part of the * * * court, but of the bank's valid contract with the [agency]." *SBA* v. *McClellan*, 364 U.S. 446, 452-453 (1960).[5]

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[5] Contrary to the Insurance Commissioner's suggestion, Comm'r Opp. at 18-19, nothing in *United States Department of the Treasury* v. *Fabe*, 113 S. Ct. 2202 (1993), supports the decision below. *Fabe* held that 31 U.S.C. § 3713 did not preempt a state statute governing priorities in insurance insolvencies, but petitioner is not arguing for any such preemption of state law. Here, as noted, state law itself assigns priority to "[c]laims having preference by the laws of the United States." Cal. Ins. Code § 1033(a)(4).

5. The state Insurance Commissioner—alone among the parties to the case, including the other respondents before this Court—argues that the question whether petitioner succeeded to the FDIC's special federal rights is governed by state rather than federal law. The Commissioner cites no case so holding, however, and in fact the cases uniformly recognize that the issue is one of federal law. *See, e.g., FDIC* v. *Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993); *Jackson* v. *Thweatt*, 883 S.W.2d at 175. That is certainly the position of the FDIC, which includes in its purchase and assumption agreements a provision specifying that "[t]his Agreement and the rights and obligations hereunder shall be governed by and construed in accordance with the federal law of the United States of America * * *." Pet. App. 27a.

Undeterred, the Commissioner notes that this provision goes on to provide that "in the absence of controlling federal law" the agreement will be construed "in accordance with the laws of the State of Texas," and argues that because there is no controlling federal law, state law governs. *See* Comm'r Opp. at 2. This plainly begs the very question presented to this Court. Other courts have held that there *is* controlling federal law—that the special federal rights of the FDIC *are* transferred to assignee banks when the FDIC assigns the underlying interests and assets. The Commissioner cannot avoid review of the conflicting ruling of the court below simply by assuming that the court was correct and that all of the conflicting precedents reviewed in the petition are wrong.

The rationale of the federal circuit and state supreme court cases holding that the FDIC assigns its special federal rights when it assigns the underlying assets conflicts sharply with the Insurance Commissioner's assertion that "only the rights of private parties are at issue here." Comm'r Opp. at 16. As the conflicting cases have recognized, any decision on whether the FDIC's special rights are transferred to FDIC assignees has a direct impact on

the value of those rights *to the FDIC*, and a direct impact on the ability of the FDIC to engage in purchase and assumption transactions in discharging its statutory responsibilities. *See* Pet. at 10-12, 14-15, 20-22. The rights of the FDIC and the interests of the national banking system are therefore very much at issue here, and the conflict among the lower courts on the question presented poses an ongoing dilemma for the FDIC. This Court should grant the writ to resolve that conflict.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ and reverse the decision below.

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